TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. [illegible]

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER [illegible], 1900.

(21,349.)

(21,349.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 553.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 18, 1908.

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1 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

28711.

UNITED STATES OF AMERICA
vs.
THE CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY.

Mr. Edwin W. Sims, Mr. J. H. Wilkerson, Mr. E. A. Parkin, Solicitors for United States of America.
Mr. George W. Kretzinger, Mr. E. C. Field, Mr. H. R. Kurrie, Solicitors for the Chicago, Indianapolis & Louisville Railway Company.

2 Pleas in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, in Chancery sitting at the United States Court room, in the City of Chicago, in said District and Division, before the Hon. Christian C. Kohlsaat, Circuit Judge of the United States for the Seventh Judicial Circuit, on Wednesday, the second day of September, being one of the days of the regular July Term of said Court, begun on Monday, the sixth day of July, in the year of our Lord one thousand nine hundred and eight and of our independence the one hundred and thirty-third year.

H. S. STODDARD, *Clerk.*

3 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

28711.

UNITED STATES OF AMERICA
vs.
CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY.

Be it Remembered, That on this day to-wit: the twentieth day of June, 1907, come the United States of America, by Mr. Edwin W. Sims, United States Attorney and filed in the Clerk's office of said Court a certain Petition in the words and figures following to-wit.

4 *Petition.*

In the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

In Equity. No. 28711.

THE UNITED STATES OF AMERICA
vs.
THE CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY.

To the Circuit Court of the United States sitting in equity within and for the Eastern Division of the Northern District of Illinois:

The United States of America, by Edwin W. Sims, United States attorney for the Northern District of Illinois, complaining shows:

I.

That this proceeding is in pursuance of section 3 of an act entitled "An act to further regulate commerce with foreign nations and among the States," approved February 19, 1903, and is instituted by said United States attorney under the direction of the Attorney-General of the United States given on request of the Interstate Commerce Commission and on information by said Commission that it has reasonable ground for believing that the defendant herein, The Chicago, Indianapolis & Louisville Railway Company, is engaged in the carriage of interstate passengers between points on the lines (hereinafter described) operated by it at less than the published rates on file and for different compensation from that named in said rates, and is also committing other discriminations forbidden by law.

II.

That the said Chicago, Indianapolis & Louisville Railway Company, a corporation chartered under the laws of the State of Indiana and having its general and principal offices in the city of Chicago, State of Illinois, was on January 1, 1907, ever since has been, and now is a common carrier, engaged in operating lines of rail-
5 way known as the "Monon Route," extending from Chicago, in the State of Illinois, through said Northern District of Illinois, by way of Indianapolis, in the State of Indiana, to Cincinnati, in the State of Ohio, and from Michigan City, in the State of Michigan, to Louisville, in the State of Kentucky, and in operating said lines then transported, ever since has transported, and now transports passengers and property from points in one of said States to points in another of said States, and as such common carrier was on said January 1, ever since has been, and now is subject to the provisions of the act to regulate commerce, approved February 4, 1887, as amended, and also to the provisions of said act entitled "An act to further regulate commerce with foreign nations and among the States," approved February 19, 1903, and also to the provisions of

an act entitled "An act to expedite the hearing and determination of suits in equity," approved February 11, 1903.

III.

That on, to wit, the 24th day of January, 1907, said defendant, under the name of Monon Route, entered into a written contract with the Frank A. Munsey Company, publisher, at New York City, New York, of "Munsey's Magazine," and that the body of said contract is, in words and figures, as follows, to wit:

"AGREEMENT, between the MONON ROUTE (Chicago, Indianapolis & Louisville Railway Company) and ..... Frank A Munsey Co. ....publisher. Entered into this .... 24 day of January 1907.

"WHEREAS, the said publisher issues .... Munsey's Magazine ... a .... publication, published at New York City, N. Y., Chicago office 423 Marquette Bldg., and which has a regular circulation of... 643,000 .... each issue.

"AND WHEREAS, The said Monon Route desires to advertise in said publication, which advertising the said publisher agrees to do upon the following terms and conditions, which are mutually agreed upon:

"1st. The said publisher agrees to publish in said publication an advertisement of the Monon Route as follows: ..... One page "ad" (divided as desired) .....
.....
.....
said advertisement to appear .. Favorably .. and occupy a space of not less than .. One page .. and to be published as desired issues of said publication.

"2d. In full consideration of the foregoing advertising, the Monon Route agrees to issue the following nontransferable transportation, based on the regular published rate:
.....Trip tickets or mileage.....
.....
To the value of .. Five hundred ..... Dollars ($500.00 ...), *for the personal use of the publisher, his employes or im-*
6 *mediate members of his or their families,* which said transportation shall be limited for use not later than December 31, 1907.

"3d. *Under no circumstances must the transportation issued under this contract be sold or transferred to or used by any other than the person to whom issued, as such sale, transfer or use would be a misdemeanor under the law.*

"4th. It is understood and agreed that the transportation issued under this contract shall read to points on the Monon Route, and not to points on any other road.

"5th. No extension of time on any transportation issued under this contract shall be given by the Monon Route or requested by the publisher beyond the date of the expiration of this contract.

6th. In case said publisher severs connection with said publication, or sells or transfers his interest therein, then said transportation shall

at once be surrendered to the Monon Route, and no new transportation shall be issued on account of said publication until after that originally issued has been returned to the Monon Route. Should any person holding transportation issued hereunder, sever connection with the publication, or should the publication suspend, or if the transportation should be presented by any person other than the one named thereon, then the Monon Route will refuse to honor the same for passage, and take the same up and collect full fare, and such presentation shall be taken and considered as a breach of contract; and it is hereby agreed that the suspension of said publication before the expiration of this contract, or the presentation of non-transferable transportation by any other than the person named thereon shall cause this contract to be void and operate as an offset to all transportation which might be considered as due the said publisher. Further, should said publisher or any person named on said tickets allow any other person to use same or offer to sell, sell or transfer the same, then said publisher agrees to pay the said Monon Route as a penalty the full rate of fare which would have been paid for regular tickets.

"7th. The said publisher further agrees to deliver to said Monon Route, at its General Office in Chicago, one copy of each issue of said publication in which said advertisement appears, free of charge, during the life of this contract.

"8th. This contract expires December 31, 1907, unless otherwise stipulated."

IV.

That at divers times since said contract was entered into as aforesaid, and previous to April 3, 1907, said defendant, in accordance with the terms of said contract and by request of said Munsey Company, transported over its said railway, through said Northern District of Illinois, from points in one of said States to points in another of said States persons who were then employees of said Munsey Company, upon trip tickets and mileage tickets issued to such persons by said defendant; that the interstate transportation so furnished by said defendant would, if paid for at the rates named in the schedule of rates, fares, and charges published and filed by said defendant as required by the provisions of said act to regulate commerce and applicable to such transportation, amount to the sum of $145.10,
7 while the only compensation received by said defendant for such transportation previous to May 10, 1907, was the publication, in the March, 1907, issue of said magazine, of a one-fourth page advertisement of said Monon Route, and that such publication of said advertisement was and is valued by said defendant and said Munsey Company at $125.

V.

That while said defendant was furnishing transportation to and transporting over its said railway between certain points employees of said Munsey Company, as stated in paragraph IV hereof, and for the compensation described in said paragraph IV, said defendant contemporaneously furnished transportation to and transported over its said railway between said points other persons, and exacted and

received in money from such other persons, in each instance, for the transportation so furnished to such other persons, the full amount of the rates named in said defendant's aforesaid schedules of rates, fares, and charges; and that in each instance the circumstances and conditions pertaining to the transportation furnished to and the transportation services performed for such employees as aforesaid were substantially similar to the circumstances and conditions pertaining to the transportation furnished to and the transportation services performed for such other persons as aforesaid.

VI.

That under and in accordance with the terms of said contract said defendant is now furnishing transportation to and transporting over its said railway, through said Northern District of Illinois, from points in one of said States to points in another of said States the publisher of said magazine and members of his family and employees of said publisher and members of the families of such employees; that said defendant has entered into other contracts, substantially the same as the contract set forth in paragraph III hereof, with other publishers of magazines and newspapers and similar periodicals, to the number of, to wit, two hundred and fifty-one, and, under and in accordance with the terms of the latter contracts, said defendant is now furnishing transportation to and transporting over its said railway, through said Northern District of Illinois, from points in one of said States to points in another of said States such persons as are, from time to time, designated by the publishers last above mentioned; that although, in every instance, the rates for the interstate transportation of passengers over said defendant's said railway, named in the schedules of rates, fares, and charges published and filed by said defendant as aforesaid, are, by the language of said schedules, made payable in money, yet said defendant does
8 not, in any instance, receive payment in money for any interstate transportation furnished or interstate transportation service performed by it as aforesaid, where it furnishes such transportation or performs such transportation service under and in accordance with the terms of any of said contracts.

VII.

That by reason of the premises said defendant is furnishing interstate transportation to and performing interstate transportation services for certain persons as provided for in said contracts for rates which, in each instance, are less than and different from the rates for such transportation and transportation services named in the schedules or rates, fares, and charges published and filed by said defendant as aforesaid, and less than the rates contemporaneously exacted by said defendant, under substantially similar circumstances and conditions, for interstate transportation furnished to and interstate transportation services performed for other members of the general public, in violation of the provisions of said act to regulate commerce, particularly sections 2 and 6 thereof, and within the meaning of sec-

tion 3 of said act to further regulate commerce with foreign nations and among the States, approved February 19, 1903.

Wherefore the complainant prays:

1. That a subpœna or other suitable process may issue, according to the course of equity, requiring said defendant, the Chicago, Indianapolis & Louisville Railway Company, to appear at such time and place as this honorable court may designate, then and there to make full, complete, and perfect answer to all the matters and things hereinabove stated and charged, as fully and particularly as if said defendant were specially interrogated in regard thereto, but not under oath, which is hereby waived.

2. That upon the filing of this petition an order may be made by this honorable court directing the manner of service of notice of the pendency of this proceeding.

3. That such order or orders may be passed pending the cause as will secure a speedy hearing and determination of the matters and things stated and charged in the foregoing petition.

4. That this honorable court will make such other persons or corporations parties to this proceeding as the court may deem necessary.

5. That this honorable court will summarily inquire into the matter of this petition, and on final hearing, upon being satisfied of the truth of the allegations contained therein, will forbid the further execution by the said Chicago, Indianapolis & Louisville Railway Company of the terms of each and every of said contract, and will enforce an observance by said railway company of its published tariffs by directing and requiring a discontinuance of the unlawful
9 practice of accepting advertisements in lieu of money in payment for interstate transportation, and will also direct and require a discontinuance of the other unlawful practices and discriminations set forth and described in said petition, by proper orders, writs, and process, as provided in section 3 of said "act to further regulate commerce with foreign nations and among the States," approved February 19, 1903.

6. That this honorable court will grant such other and further relief in the premises as to the court may seem meet and as justice and the equities of the cause may require.

THE UNITED STATES OF AMERICA,
By EDWIN W. SIMS,
United States Attorney.

(Endorsed:) Filed June 20, 1907, H. S. Stoddard, Clerk.

10 And afterwards to-wit: on the thirty-first day of July, 1907, come the defendant in said entitled cause and entered its appearance in words and figures following to-wit:

Appearance of Defendant.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Northern District of Illinois.

THE UNITED STATES OF AMERICA
vs.
CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY.

I hereby enter the appearance of the defendant in the above entitled cause and my appearance as its solicitor.

G. W. KRETZINGER,
Solicitor for Chicago, Indianapolis and Louisville Railway Company.

(Endorsed:) Filed July 31, 1907, H. S. Stoddard, Clerk.

11 And on to-wit: the thirty-first day of July, 1907, there was filed in the clerk's office of said Court in said entitled cause a certain stipulation in words and figures following to-wit:

Stipulation.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

UNITED STATES OF AMERICA
vs.
CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY.

It is hereby stipulated and agreed that the defendant in the above entitled cause may have until September 15th in which to file answer in the above cause.

EDWIN W. SIMS,
Solicitor for Plaintiff.
G. W. KRETZINGER,
Sol'r for Defendant.

(Endorsed:) Filed July 31, 1907, H. S. Stoddard, Clerk.

12 And on to-wit: the sixteenth day of September, 1907, come the Chicago, Indianapolis & Louisville Railway Company by its solicitors and filed in the Clerk's office of said Court its certain Answer in the words and figures following to-wit:

13 *Answer.*

In the Circuit Court of the United States, Northern District of Illinois, Northern Division.

In Equity. No. —.

UNITED STATES OF AMERICA
vs.
CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY.

Complaint.

Answer of the Chicago, Indianapolis & Louisville Railway Company to the Above Complaint.

Defendant admits that it is a common carrier between the points stated in the complaint, and avers that it was incorporated and exists as such common carrier under Indiana law.

Admits the making of the contract mentioned in the complaint but denies that said contract, or its performance, is in anywise prohibited by any act of Congress mentioned or referred to in the complaint.

Admits that the contract, as the same appears in the com-
14 plaint, contains among other things the following conditions and provisions, to-wit:

"AND WHEREAS, the said Monon Route desires to advertise in said publication, which advertising the said publisher agrees, to do upon the following terms and conditions, which are mutually agreed upon:

" '1st. The said publisher agrees to publish in said publication an advertisement of the Monon Route as follows: .....One page "ad" (divided as desired)..... said advertisement to appear .....Favorably..... and occupy a space of not less than ..... One page.....and to be published as desired in issues of said publication.

" '2nd. In full consideration of the foregoing advertising, the Monon Route agrees to issue the following non-transferable transportation, based on the regular published rate:

" ' ..... Trip tickets or mileage ..... To the value of .....Five Hundred..... Dollars ($500.00), *for the personal use of the publisher, his employees or immediate members of his or their families*, which said transportation shall be limited for use not later than December 31, 1907.' "

Avers that the money value and selling price of advertising space is easily ascertained and that such market price at the money value thereof, at which the same is sold to the public, being the same price stated and fixed in said contract sued on, has been fixed and for a long time has been used and applied.

Avers that the money value or the money's worth of the space purchased by defendant from the Munsey Company pursuant to this

contract was five hundred dollars ($500), as determined and fixed by the rate to the public, and as provided in said contract, the defendant was to pay therefor with five hundred dollars ($500)
15 in money's worth and value of passenger transportation issued and based "on regular published rates," being the same rate upon which transportation is sold to the public, so that the money value of said advertising space and the money value of said transportation had and possessed the same money value and money's worth, namely, five hundred dollars ($500); that the full published rate for transportation was exacted from the Munsey Company and obtained from the Munsey Company as well as from all other companies and publishers from whom this defendant purchased advertising space, and that the money value and money's worth paid for such transportation by said Munsey Company and by all other publishers from whom defendant purchased advertising space is precisely the same money value and money's worth as that paid by the public and all other passengers riding on defendant's railroad, all of which is "based on the regular published rate."

Defendant avers and shows that it derives all of its corporate powers as a common carrier from Indiana law under which it was incorporated, and while that law prohibits defendant from giving free tickets, free passes or free transportation, it authorizes defendant in express words to issue transportation in payment for printing and advertising, that such authority constitutes a complete defense to said complaint and the remedy therein prayed.

Defendant denies that the purchase of advertising space by a common carrier constitutes any part of interstate commerce, and thereupon denies that the subject of the purchase of advertising
16 space by a common carrier is within the jurisdiction and control of Congress.

Avers that if Congress had the constitutional power and authority to prohibit payment for advertisement by transportation, or to regulate the same, which it denies, it has not attempted so to do, by reason whereof defendant avers that under its authority received from Indiana law, or as permitted by the law of the land, the defendant may contract for advertising in any state or in any territory in the United States, and may pay therefor in transportation in the manner recited in said contract.

Denies the charge contained in paragraph 4 of the complaint.

Defendant denies that it ever issued or delivered to the Munsey Company transportation to the amount and in the money value of one hundred forty-five dollars and ten cents ($145.10) in payment for advertising space of the money value of one hundred and twenty-five dollars ($125) as alleged.

Avers that the above complaint was filed in the office of the clerk of the United States Circuit Court on the 20th day of June, 1907; that on that day the accounts between the Munsey Company and this defendant touching the issuance of transportation in payment for advertising space showed that this defendant had issued one hundred sixty-three dollars and thirty-six cents ($163.36) in money value in transportation "based on the regular published rates" of this defendant, and that on that same day defendant in said account stood

charged with two hundred and fifty dollars ($250) of money value for advertising space. That it may occur from time to time during the running performance of this contract that one of the
17 parties thereto will be indebted in a small balance to the other for space or for transportation as the case may be, but defendant avers that when the contract shall have been fully performed by both parties thereto as agreed and written and as is now being done, the Munsey Company will have furnished defendant advertising space of the money value of five hundred dollars ($500) at the usual advertising market rates, and defendant will have paid therefor in transportation issued and "based on the regular published rates" in the money value of five hundred dollars ($500), being the same rate at which such transportation is sold to the public and as provided and recited in said contract set forth in said complaint.

Defendant avers upon information and belief that the Munsey Company is responsible financially for all of its legal obligations, liabilities and credits.

Defendant admits that it has entered into a large number of other contracts for advertising space by written contracts, providing substantially the same as the contract with the Munsey Company as aforesaid, and that in each case pursuant to the terms and conditions of each of said contracts, the publishers named in said contracts, and in each of them, sells to this defendant advertising space in the par money value, at the usual market rate therefor, and that this defendant issues and pays therefor in transportation "based on the regular published rates" in money value, equal to the money value of said advertising space.

Avers that the transportation defendant issues and sells to the Munsey Company under and pursuant to the terms of said contract
18 has the same money value and the same money's worth as the transportation it issues and sells to the public.

That even if said contract was within the legislative jurisdiction of Congress this defendant denies that the purchase of such advertising space at its regular market value, and paying therefor in money value of transportation, constitutes a "violation of the provisions of said act to regulate commerce," or any provision or clause thereof, as alleged and averred in the complaint.

Denies that the contract mentioned and disclosed by the complaint constitutes a "special rate, rebate, drawback or any other device" mentioned or prohibited in Sections 2, 3 or 6 of the Commerce Act, as alleged.

Denies that said contract constitutes the "unjust discrimination" mentioned and prohibited in Section 2, as alleged in the complaint.

Denies that it is required to sell any transportation either for passengers or for freight only for cash, and avers that it is permitted by the law of the land, and not prohibited by any act of Congress, to sell such transportation for passengers or for freight for money or for "money's worth," or for property or for labor, which in the market has a money value equal to the money value of said transportation, as the same is fixed and published by the defendant as the commerce acts of Congress require, and that such law of the land has not been

modified or repealed by such Commerce Act, or Hepburn Act, or any provision or clause thereof.

This defendant further denies all matters and things con-
19 tained in said complaint not heretofore expressly admitted or denied herein, and asks to be dismissed hence, etc.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY.
G. W. KRETZINGER, AND
E. C. FIELD,
Solicitors and of Counsel for Said Defendant.

(Endorsed:) Filed Sep. 16, 1907. H. S. Stoddard, Clerk.

20 And on to-wit: the twelfth day of November, 1907, come the complainant in said entitled cause by its solicitor and filed in the clerk's office of said Court its certain replication in words and figures following to-wit:

Replication.

In the Circuit Court of the United States of America, for the Eastern Division of the Northern District of Illinois.

In Equity. No. 28711.

UNITED STATES OF AMERICA
v.
CHICAGO, INDIANAPOLIS & LOUISVILLE RY. CO.

The Replication of the United States of America, Complainant, to the Answer of the Chicago, Indianapolis & Louisville Railway Company, Defendant.

This Repliant, saving and reserving to itself now, and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of the said defendant for replication thereunto, says, that it will aver, maintain, and prove its Bill of Complaint to be true, certain, and sufficient in the law, to be answered unto; and, that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant without this; that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law, to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed, or denied, is true. All which matters and things this repliant is ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays, as in and by its said Bill it has already prayed.

EDWIN W. SIMS,
Solicitor for Complainant.

(Endorsed:) Filed Nov. 12, 1907. H. S. Stoddard, Clerk.

21 And on to-wit: the sixteenth day of March, 1908, being one of the days of the regular December term of said Court, 1907, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

Order of March 16, 1908.

Cause referred to Special Examiner to take Testimony.

28711.

UNITED STATES OF AMERICA
vs.
CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY.

Now come the parties by their solicitors and thereupon it is ordered that the complainant have until March 25th to file its briefs; the defendant to have until April 10th to file its briefs; and the complainant to have until April 15, 1908, to file its reply briefs. And thereupon, by agreement of counsel, it is ordered that G. Russell Leonard, be, and he hereby is appointed a Special Examiner herein to take the testimony on behalf of the complainant herein.

22 *Testimony Taken Before G. Russell Leonard, Special Examiner.*

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the Circuit Court of the United States, Northern District of Illinois.

28711.

UNITED STATES OF AMERICA
vs.
CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY.

Testimony taken in the above-entitled cause before me, G. Russell Leonard, special examiner herein, at the office of the United States district attorney, Chicago, on Wednesday, April first, 1908, and subsequent days, pursuant to the order heretofore entered herein.

Present: Messrs. E. W. Sims, J. H. Wilkerson and E. A. Parkin, representing the United States.; Messrs. G. W. Kretzinger and E. C. Field, representing the defendant.

23 ARTHUR E. WALLACE, a witness called in behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. WILKERSON:

Q. What is your name?
A. Arthur E. Wallace.

Q. Where do you live, Mr. Wallace?
A. Morgan Park.
Q. What is your business?
A. I am a trademark attorney and also manager of the Criterion Publishing Company, publisher of Mida's Criterion.
Q. Did you hold that position during the year 1907?
A. I did.
Q. And how long before that?
A. Since 1900.
Q. Just what had you to do in connection with the advertising of that publication?
A. General manager of the business, advertising in all the departments.
Q. During 1907, did you make a contract with the Chicago, Indianapolis & Louisville Railroad Company for advertising space in the paper?
A. We did.
Q. Have you a copy of that contract?
A. I have the contract itself here.
Q. Produce it please.

(The contract was produced by the witness.)

24 Mr. WILKERSON: We offer it in evidence, and I suppose counsel will agree that the commissioner will copy it and the witness will take away the original.

Mr. KRETZINGER: Yes.

The document was marked "United States Exhibit A," and is in words and figures following to wit:

"Sign Contract, Original and Duplicate, and send to Frank J. Reed, General Passenger Agent, Chicago, Ill., for acceptance. After approval the Duplicate will be returned to the Publisher.

Monon Route.

Chicago, Indianapolis & Louisville Railway.

Duplicate.

CHICAGO.

W. H. McDoel, President.
B. E. Taylor, General Manager.
Charles H. Rockwell, Traffic Manager.
Frank J. Reed, General Passenger Agent.

Advertising Contract (Form A). No. —.

Proposed Advertising Contract for 1907.

Agreement between the Monon Route (Chicago, Indianapolis & Louisville Railway Company) and The Criterion Publishing Co., publisher. Entered into this 1st day of January, 1907.

Whereas, the said publisher issues "The Criterion," (Wholesale Liquor Trade)—Semi-Monthly publication, published at 302 Dear-

born St. Chicago, and which has a regular circulation of — each issue.

And whereas, The said Monon Route desires to advertise in said publication, which advertising the said publisher agrees to do upon the following terms and conditions which are mutually
25 agreed upon.

1st. The said publisher agrees to publish in said publication an advertisement of the Monon Route as follows: Three inch Display Ad. said advertisement to appear favorably and occupy a space of not less than — and to be published in 24 issues of said publication.

2nd. In full consideration of the foregoing advertising, the Monon Route agrees to issue the following non-transferable transportation, based on the regular published rate.

Trip tickets, to the value of two hundred dollars ($200.00) for the personal use of the publisher, his employès or immediate members of his or their families, which said transportation shall be limited for use not later than December 31, 1907.

3rd. Under no circumstances must the transportation issued under this contract be sold or transferred to or used by any other than the person to whom issued, as such sale, transfer or use would be a misdemeanor under the law.

4th. It is understood and agreed that the transportation issued under this contract shall read to points on the Monon Route, and not to points on any other road.

5th. No extension of time on any transportation issued under this contract shall be given by the Monon Route or requested by the publisher beyond the date of the expiration of this contract.
26 6th. In case said publisher severs connection with said publication, or sells or transfers his interest therein then said transportation shall at once be surrendered to the Monon Route, and no new transportation shall be issued on account of said publication until after that originally issued has been returned to the Monon Route. Should any person holding transportation issued hereunder, sever connection with the publication, or should the publication suspend, or if the transportation should be presented by any person, other than the one named thereon, then the Monon Route will refuse to honor the same for passage, and take the same up and collect full fare, and such presentation shall be taken and considered as a breach of contract; and it is hereby agreed that the suspension of said publication before the expiration of this contract, or the presentation of non-transferable transportation by any other than the person named thereon shall cause this contract to be void and operate as an offset to all transportation which might be considered as due the said publisher. Further, should said publisher or any person named on said tickets allow any other person to use same or offer to sell, sell or transfer the same, then said publisher agrees to pay the said Monon Route as a penalty the full rate of fare which would have been paid for regular tickets.
27 7th. The said publisher further agrees to deliver to said Monon Route, at its general office in Chicago, one copy of each

issue of said publication in which said advertisement appears, free of charge, during the life of this contract.

8th. This contract expires December 31, 1907, unless otherwise stipulated.

(Stamped) "THE CRITERION PUBLISHING CO."

(Signed) FRANK J. REED,
General Passenger Agent, Monon Route.

(Signed) J. M. MIDA,
Publisher, Proprietor, Manager, or Editor."

Q. Taking that date, the 1st of January, 1907, speaking in reference to the year 1907, what was the fact with reference to the price which your publication got for advertising space, Mr. Wallace?

A. You mean in general or what the Monon Railroad paid?

Q. No, I mean in general. What was the general fact about the price you got for the paper?

A. Our advertising rates are standard and very strictly adhered to and they appear here on the first page of the paper. Whole page, $750 per annum; half page $400; third page $300; quarter page $240; eighth page $125; There are of course exceptions in some advertisements, where lower rates are taken for special reasons, or where higher rates are charged for special position.

28 Q. Higher rates you say are charged for special positions, and you ordinarily adhere to these rates which you print on the first page of the publication, but in cases you do deviate from the rates?

A. In some cases we deviate from the rate. Those cases are where——

Mr. KRETZINGER: I object to that unless it is shown that this contract with the Monon is one where you deviate.

Mr. WILKERSON:

Q. Did you deviate in the case of the Monon?

A. We did.

Q. What deviation was there in the case of the Monon from your regular advertising rates?

A. Forty dollars less.

Q. That is your regular rate during the year 1907 was $240 for a quarter page, and your contract with the Monon specifies $200. Is that it?

A. Yes, sir.

Q. Was that true during all of the year 1907 or what is the fact generally?

A. That has been continued with the Monon Railroad since about 1900, possibly as early as 1899, possibly as late as 1901.

Q. What changes if any have there been in your advertising rates since you became connected with the publication?

A. None whatever.

Q. That is since you have been there your advertising rate has been the same?

A. About the same.

Q. Was the Monon the only advertiser in that paper, in that publication that had this special rate?

A. No, sir, there are possibly four or five, possibly six others among our numerous advertisers.

Q. Who get that special rate?

A. Yes, sir.

Q. For instance, I direct your attention to page 27 of the publication, to two advertisements appearing on the first half page,
29 one a quarter page advertisement for the Mount Vernon Rye, the Cook & Burnheimer Company, and the other quarter page advertisement of the Green River Distilling Company of Owensboro, Kentucky. What is the fact with reference to the difference if any as to the price charged for that advertising space during 1907 and at the present time?

A. One pays the full rate, and the other pays $200 instead of $240.

Q. Which pays the full rate?

A. Green River Distilling Company.

Q. With reference to this Monon Advertising, and also with reference to the two advertisements to which I last directed your attention, so far as location in the publication is concerned, they are substantially the same. I mean by that, there is no difference in location.

A. Neither of them have preferred position. We can place them anywhere we wish in the publication.

Q. They take what you call your regular rate?

A. They take what we call our regular position, and the Green River Distilling Company, the regular rate; the other two have a reduction in rates.

Cross-examination by Mr. FIELDS:

Q. State whether the charge that you made to the Monon for the advertisement in question was the fair and reasonable cash price of that advertisment at the time it was made?

A. It was.

Q. You may state whether or not it has remained a fair and reasonable cash charge up to the present time?

A. It has. We would not have taken any less if they had paid cash instead of transportation.

30 Redirect examination by Mr. WILKERSON:

Q. Well then, how about the one for which you charged $240? Was that the fair reasonable cash price?

A. It was. There was a special reason for discount in the few cases I have mentioned where we make a reduction in the price.

Q. Any reason based upon the number of copies in which the advertisement appears, or upon the position of the advertisement?

A. None whatever, as to those mentioned.

Q. The difference then was one which went purely to the personality of the advertiser, was that it?

A. No, business reasons. For example, Cook & Burnheimer, who have a reduction in the price are a leading firm of New York im-

porters, who have been advertising in the Criterion for fifteen or twenty years, steady advertisers without ever a change in form, the same head running right along without work for the printer, a prominent firm. And helps us get other advertisements in New York City. So to induce them to remain in the Criterion we gave them a special reduction in price.

Q. So you consider that from Cook & Burnheimer you get not only your $200, but you get this other advantage to yourself of their prestige as advertisers, is that it?

A. Yes, sir, and from the Monon we get the advantage of saving paying out cash every time we go to Louisville, to which place we make frequent trips.

31 S. J. WALPOLE, a witness called in behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. WILKERSON:

Q. What is your name?
A. S. J. Walpole.
Q. Where do you live, Mr. Walpole?
A. 1684 Pemberton Avenue.
Q. What is your business?
A. Business Manager of the American Field.
Q. What is that?
A. That is a weekly publication, sportsman's journal.
Q. Where published?
A. 801 Masonic Temple.
Q. Chicago?
A. Chicago.
Q. You were connected with that publication during all of 1907 were you?
A. I was.
Q. What was the scope of your employment there?
A. I was bookkeeper until April, and then I took my present position.
Q. That is advertising?
A. Business manager.
Q. You are familiar with the business of that concern in connection with its advertising during 1907 are you?
A. Yes.
Q. And have general knowledge on the subject of price which it then received, and which it now receives from advertisers for space in the publication?
A. I have.
Q. I wish you would state, going back to the first of January, 1907, coming down to the present time, what is the fact with reference to any change in the advertising rates of your publication?
A. We have made no change barring a very small one amounting to a few cents for a certain term.

32 Q. When was the last rise in your rates?
A. The last rise was about January 1st of this year.

Q. How much of a rise was that?

A. Thirteen cents an inch for a certain period. Our yearly rates were not changed.

Q. Explain fully just what you mean?

A. I can show you on the rate card. The monthly rate was a dollar sixty-five an inch up until I had my last rate cards printed. When I printed them, so as to make the rate for the month seven dollars, I raised it to $1.75 you see instead of $1.65, an addition of ten cents an inch.

Mr. FIELD: Did you say when that was raised?

A. I couldn't say the exact date. This year sometime about January 1st.

Q. That was the rate which was appli-able to the advertiser who had his advertisement inserted in one issue. Was that the idea?

A. For four issues.

Q. Yours was a weekly publication?

A. Weekly publication, four issues.

Q. So that—so he could have it all in one issue, or he could distribute it over the four issues, but it was a monthly rate applicable to one whose advertising was done during the whole month. Is that the idea?

A. No. The ad. would have to run over four times. The one time rate is higher.

Q. That is to say, you have a rate for those who have one insertion?

A. Yes.

Q. Then you have a rate which applies to those who distribute it over the different issues during the month?

A. Yes.

33 Q. Then you have a yearly rate?

A. Then we have a three months', a six months' and a yearly rate.

Q. All different?

A. All different.

Q. The three months' rate applies to one who has an advertisement in each issue for three months?

A. Yes.

Q. The six months' rate applies to one who has an advertisement in each issue for six months?

A. Yes.

Q. The twelve months' rate applies to one who has an advertisement in each issue for twelve months?

A. Yes.

Q. Take this case, a man who contracts with you for a given amount of space to be inserted as he may wish during the year, what rate do you give him on that? Not in every issue, but all in one issue or distributed in a number of issues as he sees fit?

A. We make a rate which is subject to a discount where a certain number of inches or more are used in an issue. That is to say we will have a discount on a quarter page, a discount on a half page, and a discount on a full page which applies to the rates for the time

that the ad. is run, the number of times. For instance, a man contracts for a hundred and twelve inches or a hundred and four inches, two inches a week that would be; he would be entitled to the yearly rate. But if that was divided up to appear in three or four issues, he would receive the benefit of the discount for the space that he used.

Q. I want to be sure we understand that. Would there be any difference—take the case of myself, now, suppose I go to you and say, Mr. Walpole, I want to insert a page of advertising in your publication. I may want to put it all in one issue, or I may want to distribute it in four issues during the year, suppose I put
34 it all in one issue what would be your rate on it?

A. You would be charged the one time rate less the discount which applies to a full page.

Q. Less the discount which applies to a full page. Suppose I break it up into small issues?

A. You would be charged the monthly rate less the discount which applies to the space that is divided into.

Q. Would there be any difference between the total in the two cases?

A. I think there would. I would have to figure it out for you.

Q. Figure it out. I would like to know what the fact is about that?

A. I don't know that I ever figured that before, but the difference is very small between those two propositions.

Q. There is a difference however?

A. Yes.

Q. If it was broken up into four instead of a dozen usually the difference would be larger?

A. Yes, the difference would be larger for three months for thirteen insertions and the difference again would be a little more for six months or a year. Because the yearly rate—as the term rate goes on it becomes lower.

Q. So if a man gets a page of advertising in your periodical it doesn't make any difference whether it is all put in in one issue or scattered along during the year?

35 Mr. FIELD: One moment, we object to that unless it is confined to his paper.

Mr. WILKERSON: I am speaking of your periodical. I intended so to speak.

Mr. FIELD: You did not as a matter of fact.

A. Well, it does according to our rate. I suppose every paper has its own system.

Q. I am asking you to state just about your own system.

A. Yes, with us it does.

Q. Now, do you have some advertisers in your paper who get what you call your old rate?

A. Yes.

Q. Explain what you mean by that?

A. The rate at which the ad. was taken on the first contract.

Q. On the first contract?

A. Yes.

Q. You simply renew that contract from year to year at the same rates without regard to any advance which you might have made in your advertising in the meantime?

A. Yes.

Q. Is that right?

A. That is correct, yes except——

Q. Now, explain that so we will understand how you tell that.

A. Well, with our publication, most of our older advertisers are with us on what is known as a till for bid basis, and they are receiving the benefit of the rates that was made to them when they first gave out their advertising.

Q. How many years would that be?

A. Oh, that runs back twenty or twenty five years in some cases.

Q. They have a contract with you for a year?

A. Why, as a rule an advertiser makes a contract for a year to start with.

36 Q. Then you simply extended to them this privilege of continuing at the old rate. Is that the idea?

A. As a rule we do.

Q. But there is no contract for that effect?

A. No.

Q. You make no agreement with the advertiser to that effect?

A. No.

Q. That is simply a voluntary act on your part, is that the idea?

A. That is the idea.

Q. How many advertisers have you that you carry along on that till forbid basis?

A. Oh, I suppose twenty-five per cent. of our advertisers on that basis.

Q. What difference is there between what an advertiser who falls in that class will pay for a given amount of advertising and what they would have to pay if they came in to-day, what percentage?

A. There has been no appreciable difference in our rates in the last fifteen years, but going back of that I imagine the rates are now about one-third higher than they were.

Mr. FIELD: Than they were fifty years ago?

A. Than they were fifteen or twenty years ago.

Mr. WILKERSON:

Q. But those rates of fifteen or twenty years ago I understand you to say are now extended to this class of advertisers?

A. Yes.

Q. About twenty-five per cent. of your advertising. So I say, the result of it is this, that for about twenty-five per cent. of your advertising you collect thirty-three per cent. less than you do for the other seventy-five is that it?

A. I would not like to be exact as to the percentage. I know there is some of them.

Q. Approximately, what is your best recollection on that?

37 A. I should say twenty-five per cent., but those are business secrets that it seems to be very personal to bring out. It would not look very good to us on paper.

Q. We shall not insist you give the names unless counsel on the other side want them. What we want is just your business practice on that so far as your publication is concerned. Now, you have a contract with the Chicago, Indianapolis & Louisville Railroad Company for advertising space in return for which you got transportation during 1907 did you?

A. I am under the impression the company made a contract, but I personally did not.

Q. Have you a copy of the contract with you?

A. No. I couldn't find it.

Mr. SIMS: This is one of the publications upon the list?

Mr. FIELD: Oh yes, we will furnish you that contract.

Mr. SIMS: So I assume you got such a contract?

Mr. FIELD: Oh yes, I have a memorandum that such a contract was made with the American Field and they undoubtedly have got a duplicate.

Mr. WILKERSON:

Q. What do you know to be the fact with reference to the insertion in the American Field during 1907 of the full amount of advertising specified in the contract?

A. As to apply to what?

Q. As to space, the Monon, did it use all its space in 1907?

A. They used all they contracted for.

Q. All they contracted for during 1907. What was the fact about your using all the transportation that was covered by the contract?

38 A. To the best of my knowledge we only used about twenty per cent.

Q. About twenty per cent. of it, what did you do with the other eighty per cent.?

A. It went into the waste basket.

Q. Well, it was not used, is that it?

A. It was not used.

Cross-examination by Mr. FIELD:

Q. Has the advertisement of the Monon during the year 1907 under the contract referred to appeared in the same form throughout that period?

A. It appeared six times in the same form.

Q. How about the balance of the time?

A. Well, that was all the contract called for, was six times.

Q. Now Mr. Walpole, you may state whether the amount that the Monon contracted to pay for that advertising was the fair, reasonable cash market price of that advertisement?

A. It was the rate that was in effect when the arrangement was made.

Q. Well, you have not quite answered the question.

Read the question again.
(Question was read.)

A. Yes.

Q. And is that true up to the present? Of its being the fair reasonable cash market price of that advertising?

A. Yes.

Q. Then, at one time I think you said about January of this year you made a slight rise in the rate of $1.65 per inch to $1.75 per inch which as I understood you applied only to monthly rates, is that correct?

A. To four times or more.

Q. Had that rate any application to the rate which was given to the Monon?

A. No, because that change was not made until this year
39 and this arrangement with the Monon went into effect over a year ago.

Redirect examination by Mr. WILKERSON:

Q. When you speak of the market price of the advertising space named in the contract, of course you meant to speak of the market price with reference to the time the contract was made, do you not?

A. Yes, certainly.

Q. Now, was the Monon given this price on the till forbid basis or was it on the straight basis?

A. They were given it on the term basis.

Q. On the term basis, by that you mean——

A. The rate that applies for four times up to twelve times. When it comes to thirteen you understand the three months' rate applies. They ran six times, so they received the monthly rate.

Q. Do you discount any of your accounts for advertising?

A. How do you mean discount?

Q. Well accept a payment less than the amount of the bills you send out?

A. No.

Mr. FIELD: What was the question?

Mr. WILKERSON: I asked him if he had any scale of discount on the account?

A. For cash?

Q. Yes?

A. We allow a cash discount for payment in advance.

Q. What is your allowance for cash discount?

A. Five per cent. for cash in advance.

Q. That is when the order is given five per cent. off?

A. Yes.

40 CHARLES H. STODDARD, a witness called in behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. WILKERSON:

Q. What is your name?
A. Charles H. Stoddard.
Q. What is your place of residence, Mr. Stoddard?
A. 17 Aldine Square, Chicago.
Q. And your business?
A. I am the western manager of the Frank A. Munsey Company.
Q. How long have you been connected with the Munsey Company?
A. Oh, most of the time for twenty-five years.
Q. That is the company that publishes the periodical known as Munsey's magazine?
A. Yes.
Q. With which we are all familiar?
A. Yes.
Q. You have to do with the advertising do you?
A. Yes, I have sole charge of the advertising in the west.
Q. I wish you would tell us what the fact is about a change—about the different changes in the advertising rate in Munsey's during the period when you have been connected with the publication?
A. I think when we first started I am under the impression it was about fifty dollars a page. The circulation was about seventy-five thousand. I think the next increase was to one hundred dollars a page.
Q. About when was that made?
A. That was about twelve, thirteen or fourteen years ago.
Q. When was the next increase?

41 A. About the time we got—we reached three or four hundred thousand, and I think the rate then was about $250 a page.

Q. How long ago was that?
A. That must have been twelve years ago at least.
Q. When was the next increase?
A. Then my recollection is when we reached a half million, that was about ten years ago, then the rate was advanced to four hundred dollars a page. And then about—I think it is about eight years ago the rate was—the circulation having reached beyond six hundred thousand the rate was advanced to $500 a page, and it has been that ever since.
Q. It has been that ever since?
A. Yes.

No cross examination.

C. B. GAIENNIE, a witness called on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. SIMS:

Q. What is your name?
A. G. B. Gaiennie.
Q. And your residence?
A. 4616 St. Lawrence avenue, Chicago.
Q. What is your business, Mr. Gaiennie?
A. I am the advertising manager of the Jefferson Theatre Programm- Company.
Q. What does it do?
A. What is that?
Q. What does the Jefferson Theatre Programm- Company do?
A. They print and publish theatre programs in Chicago, and elsewhere.
Q. As advertising manager, are you familiar with the rates charged?
A. Yes, sir.
Q. Do you know whether the Monon Railroad has a contract with your company for the year 1907?
A. In 1907 I believe they did have in the early part of the
42 year for a period of one or two months, two or three months.
Q. Have you a copy of that contract with you?
A. No, sir. I have not.
Q. Have you a copy of the contract with the Monon?
A. Not with me, no, sir. It is made on the regular blanks, that they use.
Q. Do you know how much advertising space they took?
A. Two hundred dollars worth.
Q. Well, how much a page or half a page?
A. I think it was forty lines double column.
Q. What is that page division, do you know?
Q. That would be equal to about a third of a page. It is an odd size.
Q. What are your rates?
A. In advertising?
Q. Yes?
A. Why, the Maximum price is $12.00 per week, per page for each theatre.
Q. How long have the rates been that?
A. For about a year ago last September. That is a year and a half.
Q. What were they before that?
A. I think they were $10.00 before that.
Q. Do you pay a commission to your solicitors, people that solicit advertising?
A. Why, our solicitors work on a salary basis, which is based on the amount of business they do each year and balance up each year, they draw so much per week, and that is charged against the amount of business they bring in and based on a commission.

Q. Is that what you call a commission basis?

A. No, sir, that is not strictly speaking a commission basis.

43 Q. I call your attention to the advertisement of the Monon Route which occurs in the Illinois Theatre program here which occupies about—more than a quarter of a page, and ask you whether it is inserted for a quarter of a page or——

A. Why that is inserted—this is the week of March 22nd, 1908, practically the present date. That advertisement is inserted by us for the Theatre as a matter of courtesy. We have nothing to do with it. In our contract with theatres for the publication of their programs they are entitled to insert advertisements acknowledging furniture and things used in the theatres, and on that basis the theatre has inserted this Monon advertisement, which we have nothing to do with in any way beyond putting it in as a matter of courtesy to the managers of the theatre.

Q. You don't know what is the consideration for that?

A. That is something between the theatre manager and the Monon railroad, and I know nothing about it. As far as I am concerned, I am giving it away.

Q. You get nothing at all for it?

A. Nothing at all for it.

Q. How many advertisements in your programs fall within that class?

A. Depending on the manager of the theatre. In some cases there are practically none. In other cases there will be half a dozen. I say it is a matter of courtesy.

Q. Now, was that custom in existence in the year 1907?

A. That custom has been in existence before I was born, I guess with all theatre program men. They specify that in their contract with us, that they are entitled to use space to acknowledge

44 certain things, and they bring this under that head.

Q. Now what other deviations if any are there in the matter of prices charged for your advertising?

A. Well, the only deviations are in the cases of a firm or company using a great number of programs, why of course we give them discounts the same as any publication.

Q. Well, what are there—any regular places for those discounts?

A. Oh, yes, places for all of these; we average two per cent. for each theatre program. That is to say a man buying space in one theatre would pay full rates, if he bought the space in ten of them he would get twenty per cent. off of those rates. Two per cent. practically for each.

Q. Are there any other deviations?

A. No, that is the only difference we make. Well, there is a discount on length of time. The price was $12.00 per week for one week, and on a yearly basis it is $9.60. Now, if a man took all of the fifteen theatres for one year full page he would pay $9.60 times 15, less 30 per cent.

Q. Does the advertiser who advertises in two or three of your programs get a discount?

A. Yes, on the same basis. A smaller discount.

Q. Suppose you state that scale of discounts?

A. Well, it averages—it begins with $12.00 per week per page.

Q. That is for one program?

A. Per week per page per program. Then for taking one program for a year that rate would become $9.60 for one page in one program for a year. Now if the man uses more than one it begins at
45 the second one by taking two per cent. off, which makes if he takes fifteen programs, that is all we have, he would get about 26 per cent. off, because he would then have fourteen on which he would allow the discounts, making the 28 per cent. off. We generally say 25.

Q. I wish you would tell us whether or not it makes any difference, assuming now in the case of an advertiser who contracts with you for a page, is there any difference in the rates if he puts it in in quarter pages?

A. Simply *pro rata*, that is all.

Q. So he can set it out as he sees fit or put it in all at one time?

A. He can use five pages one month and ten half pages the next month. It is the same to us.

Mr. WILKERSON:

Q. Here is a point. Your price for a whole page is how much?

A. $12.00.

Q. What is that price per quarter page one insertion?

A. One insertion? Well, in that case we add ten per cent. on it.

Q. You add ten per cent.?

A. Yes.

Q. So that if I take a whole page it would cost me $12.00?

A. Yes.

Q. If I have four quarter page insertions at different issues it cost me——

A. It would cost you $4.00 a piece. That would be $16.00 in that case.

Q. Ten per cent. more in each case?

A. Yes, each time we cut it in two we add ten per cent.

Mr. SIMS: Is there any discounts on these rates for cash in advance at the time the contract is entered into?

46 A. Our contracts always read "Payable at the end of the month following," so much per week at the end of the month following.

Q. Have you ever known of any cases of discounting those?

A. Probably quite a few of them are discounted at two per cent. ten days after rendering the bill.

Q. So that in payment——

A. Thirty days after the first insertion, so that in forty days they take off two per cent.

Q. Unless it is paid within ten days then your regular rates are charged?

A. Yes, that is true on merchandise orders or anything of that kind, printing or anything, we allow two per cent. on all bills paid up to the tenth.

Q. What do you mean by merchandise orders?

A. We have a printing business besides this. We deal with the same people in printing as we do the advertising.

Q. So that your printing and your advertising is on the same basis?

A. Yes.

Cross-examination by Mr. FIELD:

Q. For the advertising which you did for the Monon for the few months in the first part of the year 1907, as to that advertising you may state whether the prices you charged under your contract was a fair and reasonable, current cash price for that advertising?

A. A fair price for the advertising. It was fair for the Monon.

Q. You may answer the question. Read it.

(Question read.)

A. No, it was less than the current cash price.

47 How much less?

A. Well, that is pretty hard to say. I don't remember the contract. I never had anything to do with it. I remember it as coming in sort of vaguely that the amount was $200.00 for this forty lines of space in four or five theatres. I don't remember just how many. But I should say it was full fifty per cent. less than the current price at that time.

Q. And did you make that representation to the Monon when you made the contract?

A. I did not make the contract.

Q. Who made the contract?

A. Mr. George Fair made the contract.

Q. If you don't know how much the contract required to be paid how are you able to state it was below the cash price?

A. Because I know the margin is large enough between them. The contract is similar to one that has been made between ourselves and the Monon railroad through Mr. Fair for a number of years, going back possibly before my connecti-n with the firm eight or nine or ten years ago. The contract has always been the same amount for the same amount of space.

Q. You don't know anything what took place at the time the contract was made as to any representation as to that being the fair value?

A. No, sir.

48 GERTRUDE GOLDBERG, a witness called on behalf of the government having been duly sworn testified as follows:

Direct examination.

By Mr. WILKERSON:

Q. State your full name, please?

—. Gertrude Goldberg.

Q. Where do you live Miss Goldberg?

A. 4149 Michigan Avenue.

Q. What is your business; are you connected with some publication?

A. Yes, sir, I am business manager of the Chicago Israelite.

Q. That is a periodical published in Chicago, is it?

A. Yes, sir, weekly.

Q. A weekly periodical. How long have you been connected with that publication?

A. Since January 1900.

Q. And what has been the scope of your duties?

A. Well, just the same as any other business manager would have.

Q. You have to do with the advertising, do you?

A. Yes.

Q. You know all about the advertising that is done in the paper?

A. Yes, sir.

Q. You had a contract in 1907 with the Chicago, Indianapolis and Louisville for advertising space?

A. That is the Monon Route?

Q. Yes?

A. Yes, sir.

Q. One of these exchange for transportation for advertising contract?

A. Yes.

Q. Have you that contract with you?

A. Yes, sir.

Q. Let me see the one for 1907 will you please? What change in the circulation of the paper has there been since you have been connected with it?

49 A. There has been a steady increase.

Q. And have your advertising rates changed from time to time?

A. To some extent.

Q. Just to what extent?

A. Well, I cannot say exactly. We have raised them some.

Q. As your circulation has increased, is that it?

A. Well, just as we consider it proper to. When I first came in we were not quite on the same foundation we are now. I tried to obtain more business, make them more regular than they were.

Q. Now, what were your rates for advertising on the 15th of January, 1907 for three inch ads. to appear favorably, a three inch advertisement. That is an ordinary three inch advertisement?

A. You mean the Monon?

Q. No, I mean your regular rate, the rate you would charge me.

A. Well, our rates vary from about five to ten cents a line. It was optional with the solicitor to get what he thought best.

Q. You said you had no regular rate. He had a margin within which he could work is that it?

A. Yes.

Q. If he could get ten cents that was all right?

A. They did not take ten cent rates for a yearly contract, but it averaged from between five and ten cents a line.

Q. I wish you would just explain that fully. You did not have any fixed rate then for anybody? Am I right in that?

A. Yes, we tried to have a fixed rate. We consider that is a fixed rate.

Q. Did you have a fixed rate?

50 A. Well, I will tell you, the solicitor had a little option of his own.

Q. Yes, that is what I mean. He could use his judgment?

A. Yes, he could use his judgment to an extent. I will tell you, regular advertisers were given a regular rate and that was maintained. It didn't make any difference how long they had been advertising.

Q. Was this contract with the Monon made at your rate current in June, 1907 or was it made at the old rate?

A. We didn't raise the rate with the Monon at all.

Q. Explain what you mean by that; you had a contract with them for how many years?

A. I couldn't say but for some time before I came to this office.

Q. And the contract was renewed from year to year on the old rate?

A. Yes, sir.

Q. Was that lower or higher than the regular rate in 1907?

A. Well, it is about the way some of the advertisers were, and it is lower than all—most of the other railroads, unless they had a six inch rate. Most of the railroads came into so many lines a year or just took a certain rate, and then sent in their ads as they wanted, no specified space, but the roads that had a specified space of so many inches fifty-two times had a set stipulated rate.

Q. How long had that rate that you charged the Monon in this contract been in effect, that is when did it begin? There was a time was there not when this was the regular rate for advertising in the paper?

A. Yes, but I don't know what took place before I came to the office, but this was the rate that was in effect when I came, and I just maintained it.

51 Q. You just maintained it?

A. Yes.

Q. Are there any—and compared with most of the other advertisers in your paper it is a lower or a higher rate I understand you to say?

A. You could average them up and you could find they were just the same as our cash rate would be. You mean just the Monon Road?

Q. Just the Monon?

A. Well, we have contracts in the paper that are as low as that now.

Q. How many have you?

A. Oh, I cannot say.

Q. Not very many, or are there a few, have you any other contracts in which the rate is as low as it is in the Monon contract?

A. Not with me.

Q. Have you any with you in which the rate is high?

A. Yes, I have our regular line contract which is what I was asked to bring.

Q. What are your rates in the regular line contract?

A. If there are five thousand lines to be used within the year it is a net rate of five cents a line.

Q. What would be your regular contract price according to the rates that you now hold out for the space that is named in the Monon contract? I wish you would figure that out.

52 A. You mean would I take one as low as that for a cash rate now?

Q. No, suppose I should come in and just want the kind and amount of advertising that is described in that Monon contract and ask you to quote me a rate on it, what would you quote me, or *or* have you any rate you would quote. I mean if I had come in on the first of January 1907 when it was made.

A. Now, do you mean whether I would take as low as that?

Q. No, I want to know what you would tell me what your rate was. I don't want to know whether you would cut the rate or not. I want to know what you would tell me the rate was.

A. Our rate for the contract—for instance if it is three or four inch specified size, the electrotype is furnished and it is not changed during the year, it is a lower rate than a man that came in and says he will use so many lines and changes, and that is the reason a contract of this sort where there is a specified amount used weekly is a little lower than the man that comes in probably three times during the year and every time he comes in his ad. is changed.

Q. How much lower is that? Have you any scales or do you use your judgment?

A. We use our judgment for the amount that is used or the number of changes.

Q. You don't have any regular scale on that?

A. I would take that ad. for about $142.00.

Q. For about $142.00?

A. Yes.

Q. On the basis of your present prices?

A. If it was a regular and no changes—just go in and no changes at all, just the electrotype that goes in.

53 Q. The same as the Monon Route that handed you an electrotype?

A. Yes, I would give you almost the lowest rate I have now, six cents a line.

Q. The Monon was made at the old rate that is one hundred. That is lower than $142.00?

A. Yes.

Q. Now, do I understand you to say that would be on the basis of the lowest rate?

A. That would be the average rate, you asked me for what would be our average.

Q. That you were quoting on January 1st, 1907?

A. Yes, sir.

Q. That is to say your average rate for this same kind of advertising and the same amount of advertising with the electrotype and everything that is named in the Monon advertisement?

A. Yes. Now, you understand me to say there that too that our rates vary a little and one solicitor may take a little lower and one a little higher. You understand that?

Q. Now, you have some contracts did I understand you to say that like the Monon contract is made on the basis of the old rates, lower rates than those that you now quote?

A. Yes, we have some that have been in the paper before I came.

Q. About what proportion of your advertising would be made at those lower rates?

A. Very few.

Q. Ten per cent. of it, would you say?

A. No, I think not.

Q. Not a tenth of it?

A. No.

Cross-examination by Mr. FIELD:

Q. Under your contract with the Monon you carried in your paper a three inch Ad. for a full year I believe?

A. Yes, sir.

54 Q. And I want to ask you now whether the price you made to the Monon on that advertisement was a fair and reasonable cash price for the same?

A. Yes, sir, we made no difference with any ads that we took for the railroad for trade. Their prices are just the same since we have gotten them for cash.

Redirect examination by Mr. WILKERSON:

Q. But you did charge some people more for the same kind and the amount of advertising than you charged the Monon didn't you?

A. I tell you because their contracts are not the same. They simply get a rate and we don't know how much they are going to use till the year is out.

Q. Didn't you charge more to somebody who had a contract?

A. No, our stipulated contract for a line contract is seven cents, and twenty five cents for reading notices, and they are just the same to-day that we are getting cash.

Q. Didn't you tell me if I wanted to make the same contract with you you would charge me $142.00?

A. That is to say I told you some solicitors would have taken it as low as the minimum price.

Q. And some would not?

A. And some would not.

Q. Depending on the solicitor?

A. Yes. You see that the contracts with railroads, the rates are just the same as our regular cash advertising.

Mr. WILKERSON: With reference to the contract about which the witnesses have testified, it is understood that counsel for the defend-

ant will furnish such as they have in their possession for use on the trial.

Mr. FIELD: Yes.

55 And thereupon an adjournment was taken until 2 o'clock P. M. April 2nd, 1908.

APRIL 2ND, 1908—3 o'clock p. m.

Met pursuant to adjournment.

Present: Messrs. Field, Kretzinger and Parkin.

GEORGE WILKES, a witness called in behalf of the government, having been first duly sworn, testified as follows:

Direct examination by Mr. PARKIN:

Q. What is your name?

A. George Wilkes.

Q. Where do you reside Mr. Wilkes?

A. I think it is 494 La Salle Avenue.

Q. Chicago?

A. City, yes, sir.

Q. And what is your business?

A. I am the business manager of the Chicago Horseman Newspaper Company.

Q. That is a magazine devoted to sporting interests?

A. To the trotting and the pacing art, yes.

Q. How long has that corporation been publishing that paper?

A. Well, the present corporation has published it I believe for more than twenty years. The paper in its present consolidated form has been in existence for seventy-seven years.

Q. How long have you been connected with it?

A. I have been connected with the Horseman for a little more than a year.

Q. And that is during the year 1907?

A. 1907, yes, sir.

Q. Prior to that, had you any newspaper or magazine experience?

A. Yes, quite considerable.

56 Q. For what length of time?

A. Oh, for about twenty years.

Q. In your connection with the Horseman, do you have charge of the advertising for the magazine?

A. Yes, sir.

Q. During 1907, state whether or not you had a contract with the Monon for publishing in your paper?

A. We did, yes.

Q. Will you produce it?

A. This is the contract.

Mr. PARKIN: He can keep that can he, and you will give us the original, judge?

Mr. FIELD: Well, as long as he has got that there you might as well have it copied. It wouldn't make any difference.

Mr. PARKIN: Then we offer that in evidence.

The document was marked "Government Exhibit B," and is in words and figures following to-wit:

Sign Contract Original and Duplicate and send to Frank J. Reed, General Passenger Agent, Chicago, Ill., for acceptance. After approval the Duplicate will be returned to the Publisher.

Monon Route.

Chicago, Indianapolis & Louisville Railway.

Duplicate.

CHICAGO.

W. H. McDoel, President.
B. E. Taylor, General Manager.
Chas. H. Rockwell, Traffic Manager.
Frank J. Reed, General Passenger Agent.

Advertising Contract (*Form A*). *No.* —.

Proposed Advertising Contract for 1907.

Agreement between the Monon Route (Chicago, Indianapolis & Louisville Railway Company) and Horseman Newspaper Co., publishers. Entered into this 12th day of March, 1907.

57 Whereas, the said publisher issues "The Horseman" weekly publication, published at 357 Dearborn St., Chicago, and which has a regular circulation of 16,000 each issue.

And whereas, the said Monon Route desires to advertise in said publication, which advertising the said publisher agrees to do upon the following terms and conditions which are mutually agreed upon:

1st. The said publisher agrees to publish in said publication an advertisement of the Monon Route as follows: Two and a half inches, or 35 lines—said advertisement to appear favorably and occupy a space of not less than 2½ in. or 35 lines and to be published in 42 issues of said publication.

2nd. In full consideration of the foregoing advertising, the Monon Route agrees to issue the following non-transferable transportation, based on the regular published rate.

Trip-Tickets—

To the value of ninety-three dollars ($93.00) for the personal use of the publisher, his employés or immediate members of his or their families, which said transportation shall be limited for use not later than December 31, 1907.

3rd. Under no circumstances must the transportation issued under this contract be sold or transferred to or used by any other than the person to whom issued, as such sale, transfer or use would be a misdemeanor under the law.

4th. It is understood and agreed that the transportation issued under this contract shall read to points on the Monon Route, and not to points on any other road.

5th. No extension of time or any transportation issued
58 under this contract shall be given by the Monon Route or requested by the publisher beyond the date of the expiration of this contract.

6th. In case said publisher severs connection with said publication, or sells or transfers his interest therein, then said transportation shall at once be surrendered to the Monon Route, and no new transportation shall be issued on account of said publication until after that originally issued has been returned to the Monon Route. Should any person holding transportation issued hereunder, sever connection with the publication, or should the publication suspend, or if the transportation should be presented by any person other than the one named thereon, then the Monon Route will refuse to honor the same for passage, and take the same up and collect full fare, and such presentation shall be taken and considered as a breach of contract; and it is hereby agreed that the suspension of said publication before the expiration of this contract, or the presentation of non-transferable transportation by any other than the person named thereon shall cause this contract to be void and operate as an offset to all transportation which might be considered as due the said publisher. Further, should said publisher or any person named on said tickets allow any other person to use same or offer to sell or transfer the same, then said publisher agrees to pay the said Monon Route as a penalty the full rate of fare which would have been paid for regular tickets.

7th. The said publisher further agrees to deliver to said Monon Route at its general office in Chicago, one copy of each issue of said publication in which said advertisement appears, free of
59 charge, during the life of the contract.

8th. This contract expires December 31, 1907, unless otherwise stipulated.

(Signed) FRANK J. REED,
General Passenger Agent, Monon Route.

(Signed) CHICAGO HORSEMAN NEWSPAPER CO.,
Publisher, Proprietor, Manager or Editor.
By D. J. CAMPUS, *Pres.*"

Q. Did your publication furnish all the advertising called for by that contract during the year 1907?

A. We did, yes.

Q. Were you paid in transportation?

A. Transportation. That is, according to the terms of the agreement we were paid what we called for.

Q. State whether or not during 1907 your company used all of the transportation called for and given you under that contract?

A. We used no transportation whatever. We did call for one mileage book, which was turned over to us, but no part of it was utilized.

Q. So that in actual cash, figuring the transportation which you did use was equivalent to cash. How much did you receive for your $93.00 worth of advertising?

A. I shall have to refer to that volume. The amount of the contract was $93.00. Oh, this is the Monon. I was a little confused between this and the other road. The contract calls for a total of $93.00 worth of advertising, of which $53.25 was charged to profit and loss.

Q. Just explain to us what that charge would mean?

A. Well, that was a part of the contract figures that were not made use of by us in transportation.

60 Q. So that you received in return for your $93.00 of advertising?

A. The difference between $53.25 and $93.00 and I believe a small part of that was returned as a credit as unused.

Q. Did you have a contract with any other road during 1907?

A. We had a contract with the Chicago & Alton.

Q. Was that to be paid in transportation also?

A. Yes.

Mr. KRETZINGER: We object to the evidence as to the Chicago & Alton being introduced into this case, this case had not anything to do with it.

Mr. PARKIN: I will put this in on the general proposition of the value of advertising space.

The document was marked "Government Exhibit C" and is in words and figures following to-wit:

"Form G. T O 150 A. 3.07. 500.

The Chicago & Alton Railroad Company.

1907. Duplicate. 1907.

Illinois *Newspaper Advertising Contract.* Illinois.

This form to be retained by the publisher and a careful record kept upon the reverse side of all transportation received.

Memorandum of Agreement between the Chicago & Alton Railroad Company, party of the first part, and George Wilkes, party of the second part. Publisher of the Horseman pubished "Weekly—Tues. { If monthly state day of month. / If weekly state day of week. } at 357 Dearborn St., Chicago—City—County. State of Ill. { whether general newspaper, Religious, agricultural, etc. } horse.

61 established 1831, having a circulation of 16,000 copies per issue, hereby agrees to publish for said party of the first part, in said paper 9 times the half tone (Specify whether stock will take

half tone or line-cut) advertisement of the party of the first part, as per copy furnished, measuring 56 lines.

2. In full compensation for such advertising, the party of the first part agrees to issue for the use of the party of the second part, transportation in the form of mileage and trip tickets to the value of forty-five and 36/100 dollars ($45.36).

3. It is agreed that tickets will be issued under this contract, only for the exclusive and personal use of the editors, proprietors, business managers and employés of the party of the second part; and to the wives and children of the editors, proprietors and business managers of the party of the second part, who are wholly dependent upon them for support.

4. It is agreed between both parties that all tickets issued under the contract will be good only for transportion within the State of Illinois, and must not and will not be used in connection with or as any part of an interstate trip, as such use of transportation is in violation of the amended Interstate Commerce Act as construed and announced in Tariff Circular No. 2–A dated September 15, 1906, covering the issuance of interstate transportation; and the party of the second part agrees to indemnify and hold harmless said party of the first part against and from any and all fines, penalties and damages in any way arising or resulting from any use of such transportation in violation of this agreement.

62 Tickets issued under this contract will not be accepted for passage on "Alton Limited" train; and all other conditions of the contract of such tickets are hereby made a part of this agreement.

5. Tickets furnished under this contract are strictly non-transferable, and good only for passage on the trains of party of the first part when presented by the person whose name is signed to their contracts, and party of the second part hereby agrees that if such tickets are sold, or attempted to be sold, transferred or given away, or if presented in any other manner than provided in the contract on back thereof, or found in the hands of other persons, they shall be forfeited to the party of the first part, may be taken up wherever found by any agent or conductor of the party of the first part, and that party of the second part agrees to promptly pay, in cash to the party of the first part, the full value of all tickets said party of the second part misuses, or attempts to misuse.

6. Should the paper suspend publication, or should party of the second part sell or transfer his interest therein, or should this contract be terminated for any reason by either party prior to its expiration, said party of the second part agrees to surrender at once to the party of the first part all tickets issued under this contract and not used for passage on trains. In case of failure to do so, party of the first part reserves the right to have same taken up by its conductors or agents wherever found.

7. Should a party holding tickets sever connection with the paper, party of the second part agrees to obtain said tickets and re-

63 turn same at once to party of the first part, and no other tickets shall be issued to any other party on account of such

paper until said tickets have been returned to the party of the first part. Should party of the second part fail to obtain and return misused tickets issued to parties, party of the first part reserves the right to instruct his conductors and agents to take up such tickets wherever found.

8. Party of the second part hereby agrees that a copy of each issue of said paper shall be mailed free to the local ticket agent at the station at which this contract is executed; also the Division Passenger Agent on whose division the paper is published, also, one copy free to the General Passenger Agent, for party of the first part at Chicago, Ill.

9. It is also understood and agreed that this agreement can be terminated by either party at any time during the year 1907, and that, in any event it will terminate on both sides at the close of the year 1907. That is to say, that the party of the second part will discontinue advertisement at the close of the year 1907, and that tickets will be issued by the party of the first part good in 1907, only for advertising done in 1907, and that no tickets or half-rates will be issued in 1908, or thereafter for advertising done in 1907; the service for advertising on one side and the issue of tickets on the other, will cease with the year 1907.

64 10. Should the party of the second part fail to carry out the terms as herein provided, or misuse or attempt to misuse transportation issued under this contract, party of the first part reserves the right to cancel the contract, and said party of the second part agrees that upon such failure or misuse all his right and interest in tickets then outstanding shall be forfeited and revert to said party of the first part.

11. It is further agreed that the following regulations of the party of the first part regarding issue of editorial transportation shall be made a part of the agreement.

Requisitions for transportation due on account of this agreement must be made in writing by the individual who signs this agreement, and (when possible to do so) on the resident agent of the Chicago & Alton Railroad Company. They must in all cases state what connection the party for whom transportation is requested has with the publication; otherwise requisitions will be returned for such information. All Editorial Tickets must be signed by the person named thereon in the presence of an authorized agent of The Chicago & Alton Railroad Company. Requisitions should therefore, state what station it will be most convenient for the recipient of tickets to call for and sign for the same.

Signed (subject to the acceptance of the General Passenger Agent) for the party of the first part at Chicago, this 28th day of March, 1907.

GEORGE WILKES,
"Business Manager."

Accepted for the Chicago & Alton Railroad.

65 JEO. CHARLTON, *General Passenger Agent.*

Record of Advertising Carried.

1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30.

	Display.
January.	*Reading Notices.*
February.	Display.
	Reading notices.
March.	Display.
	Reading notices.
April.	Display.
	Reading notices.
May.	Display.
	Reading notice.
June.	Display.
	Reading notices.
July.	Display.
	Reading notices.
August.	Display.
	Reading notices.
September.	Display.
	Reading notices.

Record of Advertising Carried.

1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 22, 23, 24, 25, 26, 27, 28, 29, 30, 31.

October.	Display.
	Reading notices.
November.	Display.
	Reading notices.
December.	Display.
	Reading notices.

The Original and Duplicate of this contract must both be returned to General Passenger Agent for Acceptance.

Q. State with reference to that contract, whether or not the Horseman was paid in full and got money for all the advertising?

A. Well, the contract called for a total of $45.36 worth of space, of which we charged $38.32 to profit and loss, and there was one mileage book issued of the value of ten dollars, which was never used.

Q. Well, did you then receive from the Alton payment in full in transportation for that advertising space under the contract?

A. Well, we gave the advertising, under the terms of the
66 contract, but received absolutely no return for it.

Q. State whether or not, Mr. Wilkes, at the time you were carrying the contract with the Alton you published any other advertisements for mercantile houses in your publication?

A. Yes.

Q. Were all of the advertisements for those mercantile houses for the same amount of space as used by the Monon charged at the same rate as you charged the Monon?

A. No, in most instances it was less.

Mr. KRETZINGER: Less to whom?

Mr. FIELD: Which would have been less, the advertisement to the merchant? He does not make that definite?

Mr. PARKIN:

Q. That is, the Monon was charged more?

A. The Monon was charged more. The Monon was charged our regular card rates.

Q. Explain if you will, Mr. Wilkes, just the method by which some advertisers got a little better rates than you gave the Monon in this instance?

A. Well, it is a practice with us to endeavor to procure our full card rates. There are a great many advertisers that commenced doing business with us quite a number of years ago, and they established a precedent for a low rate. That is our card rates, specifies a rate per inch according to the aggregate number of inches used in our publication during a year. The concerns that advertised with us established a precedent based on some prior contract for a specified number of inches utilized during the year of that contract, and we applied them along the subsequent years on the old rates regardless as to whether they utilized the requisite number of inches or not.

67 Q. That is, they would get a space equal to that occupied by the Monon in the same issue for less money than the Monon paid in transportation?

A. Had they established precedent for it, yes.

Q. In other words the card rate, or the regular advertising rate has not been made absolute as to all advertisers?

A. No, it would be a difficult matter to do that with any publication.

Q. State whether or not in your experience in advertising, what are known as strong or big advertisers, are able to practically dictate the rate which they should pay in a great many instances?

A. Well, in the trade or class publications whose circulation is limited, they can do it, and do it very successfully.

Q. State whether or not you have had, in your experience as an advertiser, parties advertising for, say two hundred inches of space to be used throughout the year or throughout a period of six months, and after making the contract for two hundred inches, they would use, say fifty inches and pay for the fifty inches at the rate charged for the advertiser who took the two hundred?

A. That would be very often the case. In other words, they would take advantage of the larger aggregate and pay the rate that that would entitle them to for the smaller amount utilized.

Q. That is two hundred inches used in a definite number of months is entitled to a much smaller rate is it not than the fifty inches?

A. Two hundred inches is entitled to a much less rate than the fifty inches.

Q. They would in that way get the advantage of the lower rate and use only the smaller number of inches?

A. Yes.

68 Cross-examination by Mr. FIELD:

Q. What you have denominated as a card rate is your regular published rate is it not?

A. Regular published rate, yes.

Q. And will you state whether or not that is the rate applied under your contract with the Monon Company?

A. No, it was not, but it was our fault, as our bookkeeper called on the Monon Route and was asked our rates, and through an error in calculation he made it a little less than the regular card rates, although it was understood that our card rates should apply, although in this instance we let it pass.

Q. What practically was the difference between what the rate was as stated in the contract and the card rates?

A. The contract called I believe for forty-two inches, if I am not mistaken. The contract called for a total of forty-two inches, which according to our card rates would be $1.19 an inch, and I believe that would represent about $105. but through an error in calculation on the part of our bookkeeper who solicited this business it was put in at $93.00.

Q. That was wholly the result of a mistake on the part of your bookkeeper or solicitor?

A. Yes.

Q. These fifty-three dollars and some cents that you charged to profit and loss. Do I understand from that that that is that portion of the transportation which was issued to you which was not used?

A. No, not all of it. There was a part of this ticket endorsed on the back I believe that was retained. There is a little corespondence that bears on that I believe. But, other than that the

69 $53.25 represents a balance for which we made no demand. I believe there is a mileage book there that is not entirely used.

Q. For which you made no demand for the transportation?

A. For further transportation.

Q. You may state whether or not your card rates which you publish are the fair and reasonable cash price of that service?

Redirect examination.

By Mr. PARKIN:

Q. That is with the exception that some advertisers who have contracts made years ago have got the same amount of space for less money?

A. Well, they do. It has been our endeavor to overcome that discrepancy, but it is a difficult matter to do. Advertisers are a peculiar class of people, and we did not want to antagonize them.

Q. In other words, the old advertisers who have been with you for years and got a rate years ago insist upon paying that rate though it be lower than the rate on your card, is that it?
A. Exactly, yes.
Q. And you find it difficult to overcome that proposition?
A. Yes.
Q. And are compelled to discriminate as between advertisers?
A. Yes, if we want to retain them on our books.

70 EDWIN T. JOHNSON, a witness called on behalf of the government, having been first duly sworn, testified as follows:

Direct examination by Mr. PARKIN:

Q. What is your name?
A. Edwin T. Johnson.
Q. Where do you reside, Mr. Johnson.
A. 503 Congress street.
Q. In Chicago?
A. Yes, sir.
Q. What is your business?
A. I have a dry goods and men's furnishing store at Laflin & Harrison. I also have the National League score card.
Q. The National League score card is the book or publication issued at the ball grounds in Chicago containing the list of fairs and the score card?
A. Yes, sir.
Q. How frequently is that publication issued?
A. Daily. That is, when we have a game.
Q. Daily every time you have a ball game?
A. Yes, sir. Say about eighty to ninety games during the season; eighty to ninety of course or something like that.
Q. In their score book or score card you carry a number of advertisements?
A. Yes, sir.
Q. State whether or not you carried last year an advertisement for the Monon railroad.
A. We did.
Q. The Chicago, Indianapolis & Louisville?
A. Yes, sir.
Q. Have you a copy of your score book containing that ad.?
A. Yes.
Q. Now, that ad. appearing on page 16 of the book which I will mark Exhibit B, this ad. occupies what space?
A. One-quarter page or space four, page 16 is it not?
Q. Quarter of a page?
71 A. Yes, sir, we number them. this way. That is one (indicating) and two (indicating) which calls for space 1, page 16.
Q. That is that was four spaces on a page?
A. Yes. This is three (indicating) and this is four, page 16.
Q. State how much money was paid either in cash or transportation for that ad.?

A. Not a cent that I know.

Q. Do you know under what arrangement that was carried last year?

A. No, sir, I don't. The score card when I first took it up years ago they had carried the advertisements for four different roads and when I bought the concession it was part of my contract—that is, verbal agreement with Mr. Hart, that I carry these gratis.

Q. I see. Have you a contract at present for this year's book?

A. The coming year?

Q. Yes?

A. Yes, sir.

Q. For the same space?

A. No, sir.

Q. How much did they take this year?

A. They took a quarter page.

Q. But it is the same amount of space?

A. The same amount of space, yes sir.

Q. What is the contract price?

A. $50.00.

Q. $50.00 for a season?

A. Yes, sir for the entire season all performances.

Q. Is that your regular card rate?

A. Yes, sir, just about. We vary, as I told you before, as I suppose you know. Now, around the batting order it is like the theatre cast around the program. That is the part of course that everybody reads that keeps the score.

Q. You charge them some more for that?

A. Oh, yes, sir.

Q. But, now, take a page like page 16 here, marked Government Exhibit D, the Monon ad. which is space you say now worth $40.00 would you get $40.00 from each other quarter page in that?

72 A. Yes, sir, we usually when they take half that way cut them in five as an inducement to get them to take the half page you know, we make one-quarter $40.00. If they will take the half page we make it $75.00.

Q. Yes. Now, state whether or not you charged the same rate to all classes of advertisers?

A. No, sir.

Q. What distinction do you make for equal space, equal advantages and equal inches?

A. Well, it is this way, it is owing to what we are advertising. Now, for instance the man whose pop ad. I carry I get many times as much for his ad. as I do for a haberdasher or a tailor, because he gets a double ad. His goods are sold on the ground. The same way with candy and cigars and tobacco.

Q. That is you charge——

A. Practically we sell him the privilege. We tell him if he takes an ad. for such an amount of money we will sell his candies exclusively. Or we will sell the John J. Lynch cigar, if he takes a certain amount of advertising.

Q. In other words, if he takes the quarter page for which the Monon pays $50.00 he might pay as high as how much?

A. Well, he might pay as high as $500.00.

Q. For that quarter page?

A. Yes, sir.

Q. Any other distinction between publishers?

A. No, sir.

Q. State whether or not you charge what are known as saloon and whisky advertisers a little above the ordinary?

A. Well they run about the same, about $40.00 or $50.00. Sometimes we get—owing to the space.

Q. Well, for a quarter page the same as the Monon pays
73 $50.00 how much would you charge—what is your prices with reference to breweries?

A. We have some $50.00 and some $40.00.

Q. The same space and the same position?

A. Well, of course it cannot be the same position, but relatively the same.

Q. Relatively the same?

A. Yes. I would say that the Monon are paying—well, their rate corresponds really with the others.

Q. Take page 17 of the magazine here Exhibit D, the top half of that page appears to be given over to the Fortune Brothers Brewing Company. What rate did you get for that?

A. If I remember right it was $75.00 for the half page.

Q. $75.00 for that half page?

A. I wouldn't say positively because I could not. I think it was. It may possibly have been $100. It was either $75.00 or $100. You see I send out solicitors with a dummy, and there is lots of these ads. that are really taken as friendship ads., friends of theirs that they go to.

Q. They take those at a less figure, do they?

A. No, they hold them up, because they are friends.

Q. In other words, Mr. Johnson, you get all you can for your space?

A. Yes, sir.

Q. If you cannot get $50.00 you get $40.00?

A. If each one of my solicitors turns me in an ad.—I hope he will when I get home—for $200.00 for a quarter space I shall not refuse it.

Q. In other words, you would sell this space that you sell the Monon for $50.00 for $200.00 if you could?

74 A. Yes, sure.

Q. And if you could not get $50.00 you would take $35.00 at the last chance?

A. At the last chance, yes, sir. For this reason—not at this stage of the game we wouldn't.

Cross-examination by Mr. FIELD:

Q. Mr. Johnson, the contract for 1907 I understand you did not make with the Monon?

A. No, sir.

Q. That was made by some one who was publishing this paper before?

A. Oh, no, I have the card, only as I say that was a sort of a legacy handed down to me to keep hands off the rates and when Mr. Hart stepped out and I took hold of the card, I made a contract—I bought it outright with Mr. Murphy last year, and I says "I suppose you want to reserve the spaces for the roads the same as usual" and he says "Yes certainly,"

Q. That is what he told you?

A. That is what Murphy told me this last year 1907.

Q. When did you get the contract of 1907, when did it come into your possession?

A. I never saw the contract for 1907. I do not know that there is one that exists.

Q. The contract that you have personal knowledge of is the contract of 1908 which provides for a quarter of a page at the price of $50.00?

A. Yes, sir, this is the first year I have ever gotten anything from the Monon.

Q. I see. And that rate of $50.00 is in compliance with your card rate?

A. Yes, sir.

Q. And is that card rate a fair and reasonable price for that amount of advertising?

A. Yes, sir, it is very reasonable, very cheap when you con-
75 sider that it runs the entire season, and the publication, and the number that is sold, I think it is the cheapest advertising in the city.

Q. And under your contract of 1908 you are entitled in payment of the publication to $50.00 in transportation?

A. Yes, sir.

Q. That you have not yet received?

A. No, sir.

Redirect examination by Mr. PARKIN:

Q. When you say it is a reasonable price you mean that it is reasonable to the Monon, is that it?

A. Yes, sir, it is a fair price to the Monon, yes, sir. I would positively just as soon have the transportation as the money. My home is in Cincinnati and I spend that much every year with the Monon anyhow or some other road, and it is equivalent to the money with me.

Recross-examination.

By Mr. FIELD:

Q. You answered that $50.00 was a fair price to the Monon. It is a fair price is it not to anyone who wants advertising?

A. Yes, sir.

Re-redirect examination.

By Mr. PARKIN:

Q. You have not what is known as the card rate, have you?
A. No, sir.
Q. You get whatever you can for your ads?
A. No, we start out—we have and we haven't. We have this way. We start the boy out with a dummy. We told him this year to charge $40.00 a space not to take less than that.
Q. Not to take less than $40.00?
76 A. Not to take less than $40.00. Now, the same as that gentleman said to you we have one left there this year, a half that when I first took the card the circulation was about—well it didn't amount to anything that it does now, and we have got one I believe there they paid $25.00 and the solicitor turned it into us and we held it out to see—when we came to go to press you know if we have a vacant place we will fill it in. Now, I have got a couple of ads in there last year that are friends of mine that I just put in as fillers, and that is the way we use that ad.
Q. So that you try not to go below $40.00 for a quarter page?
A. No, sir.
Q. But you go as much higher as the traffic will stand?
A. Yes, sir.
Q. $50.00 to the Monon is a little above the minimum?
A. Well, yes and no. Now when you consider transportation we think not. We consider that a sort of a trade order.
Q. You think you ought to get a little more when you take transportation?
A. Why, yes, to be candid with you I was going down to solicit Mr. Reed—I was going to try to hold you up for more money than that for the Worlds Champion.

77 Circuit Court of the United States, Northern District of Illinois, Eastern Division.

UNITED STATES OF AMERICA
vs.
CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY.

I, G. Russell Leonard, to whom the above cause was heretofore referred, to take and report testimony therein as Special Examiner, do hereby certify as follows:

I. That pursuant to notice and by agreement of counsel the foregoing testimony on the part of the Government was taken before me at the office of the United States District Attorney, in the city of Chicago, in the State of Illinois, in said District and Eastern Division thereof, at the several times stated in the transcript of said testimony, as will more fully appear thereby.

II. That during the taking of said testimony I was attended by counsel for the Government, and by counsel for the defendant and by the witnesses hereinafter named.

III. That the names and places of residence of the witnesses examined on behalf of the Government, and whose depositions are hereto annexed, are as follows:

78 Arthur E. Wallace, Chicago, Illinois.
S. J. Walpole, Chicago, Illinois.
Charles H. Stoddard, Chicago, Illinois.
G. B. Gaiennie, Chicago, Illinois.
Gertrude Goldberg, Chicago, Illinois.
Geo. Wilkes, Chicago, Illinois.
Edwin T. Johnson, Chicago, Illinois.

IV. That all of said witnesses were of sound mind, and each witness, before giving his testimony, was duly cautioned and sworn by me to tell the whole truth, and nothing but the truth.

V. That the testimony of said witnesses was given orally, and was taken down by me in shorthand and was thereafter reduced to typewriting.

VI. That the reading of said testimony to or by said several witnesses, and the signing of the same by them respectively, were, by stipulation of the counsel for the respective parties, waived and dispensed with.

VII. That the foregoing transcript contains a full and true report of the testimony of the several witnesses aforesaid, and of the proceedings before the undersigned at the taking thereof, and is the typewritten transcript aforesaid of my shorthand notes, and that all objections which were interposed on behalf of any of the parties, at or during the taking of said testimony, have been duly noted on said transcript as thereon shown.

79 VIII. That certain documentary exhibits, and certain physical exhibits, which are referred to in the foregoing transcript, were offered in evidence as in said transcript stated, and have been duly marked and identified by the undersigned.

IX. That I have retained the foregoing transcript and all of said exhibits, in my possession until the same were delivered by me in the said Circuit Court of the United States of the Northern Division of Illinois, at the clerk's office of said court in the city of Chicago, in said Northern District of Illinois and Eastern Division thereof.

In Witness Whereof, I have hereunto set my hand and seal as Special Examiner aforesaid, at the city of Chicago, this third day of April, A. D. 1908.

[SEAL.] G. RUSSELL LEONARD,
Special Examiner in Equity of the United States Circuit Court for the Northern District of Illinois and Eastern Division thereof.

(Endorsed:) Filed May 11, 1908, H. S. Stoddard, Clerk.

80 And on to-wit: the eleventh day of May, 1908, being one of the days of the regular December term of said court, 1907, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

Order of May 11, 1908: Cause Taken Under Advisement.

28711.

UNITED STATES OF AMERICA
vs.
CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY.

Now come the parties by their solicitors, and thereupon this cause comes on to be heard upon the pleadings and proofs, and the court having heard the arguments of counsel to conclusion and not being sufficiently advised in the premises, takes time to consider.

And thereupon the defendant is given one week in which to file its additional brief; the complainant one week thereafter to file its additional reply brief.

81 And on to-wit: the fifteenth day of July, 1908, there was filed in the clerk's office of said Court in said entitled cause a certain opinion in words and figures following to-wit:

82 *Opinion.*

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. 28711.

UNITED STATES OF AMERICA
vs.
CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY.

KOHLSAAT, *J.:*

The government files its petition herein under the provisions of Sec. 3 of the Act of February 19, 1903, creating a summary remedy in certain cases, and seeks thereby to prevent the defendant from giving transportation in exchange for advertising, in accordance with the terms of a contract entered into between defendant and Munsey's magazine, which reads as follows:

"Agreement between the Monon Route (Chicago, Indianapolis & Louisville Railway Company) and Frank A. Munsey Co., Publisher, Entered into this 24th Day of January, 1907.

Whereas, the said publisher issues Munsey's Magazine a publication, published at New York City, N. Y., Chicago office 423 Marquette Bldg., and which has a regular circulation of 643,000 each issue.

And whereas, The said Monon Route desires to advertise in said publication, which advertising the said publisher agrees to do upon

the following terms and conditions, which are mutually agreed upon:

1st. The said publisher agrees to publish in said publication an advertisement of the Monon Route as follows: One page "ad" (divided as desired) said advertisement to appear Favorably and occupy a space of not less than One page and to be published as desired issues of said publication.

2nd. In full consideration of the foregoing advertising, the Monon Route agrees to issue the following nontransferable transportation, based on the regular published rate:

Trip tickets of mileage

To the value of Five hundred Dollars ($500.00), for the personal use of the publisher, his employees or immediate members of his or their families, which said transportation shall be limited for use not later than December 31, 1907.

3rd. Under no circumstances must the transportation issued under this contract be sold or transferred to or used by any other than the person to whom issued, as such sale, transfer or use would be a misdemeanor under the law.

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4th. It is understood and agreed that the transportation issued under this contract shall read to points on the Monon Route, and not to points on any other road.

5th. No extension of time on any transportation issued under this contract shall be given by the Monon Route or requested by the publisher beyond the date of the expiration of this contract.

6th. In case said publisher severe connection with said publication, or sells or transfers his interest therein, then said transportation shall at once be surrendered to the Monon Route, and no new transportation shall be issued on account of said publication until after that originally issued has been returned to the Monon Route. Should any person holding transportation issued hereunder, sever connection with the publication, or should the publication suspend, or if the transportation should be presented by any person other than the one named thereon, then the Monon Route will refuse to honor the same for passage, and take the same up and collect full fares, and such presentation shall be taken and considered as a breach of contract; and it is hereby agreed that the suspension of said publication before the expiration of this contract, or the presentation of non-transferable transportation by any other than the person named thereon shall cause this contract to be void and operate as an offset to all transportation which might be considered as due to said publisher. Further, should said publisher or any person named on said tickets allow any other person to use same or offer to sell, sell or transfer the same, the said publisher agrees to pay to said Monon Route as a penalty the full rate of fare which would have been paid for regulaw tickets.

7th. The said publisher further agrees to deliver to said Monon Route, at its General Office in Chicago, one copy of each issue of said publication in which said advertisement appears, free of charge, during the life of this contract.

8th. This contract expires December 31, 1907, unless otherwise stipulated."

The petition charges that the action of the defendant in issuing such transportation constitutes a violation of the statute which prohibits a carrier from accepting in payment for transportation, any compensation greater or less or different from that named in the published rates.

Defendant insists that it receives full money value for what it grants, at regular schedule rates, and denies that the transaction comes within the Act. It also sets up the Indiana Act authorizing
84 such exchange. This latter defense cannot be availed of in this proceeding. The matters in issue are concededly Interstate commerce transactions, as to which, it is well settled, a state statute is ineffectual. The federal law alone applies.

Practically, the question submitted is whether transportation supplied in accordance with the terms of the contract constitutes a rate greater or less than, or different from, that given the general public. The question as to the value of the advertising is a contested one. Manifestly, there can be no fixed price placed upon it. The number of copies issued, the character of its subscribers, and very many other questions enter into the estimate of its worth. It is, therefore, impossible to say what its cash or market value is, except by comparison with other advertising rates. It cannot be said that the evidence is conclusive or even convincing on the point. Indeed, if it is taken at its cash value, why should the transportation be limited as specified in the contract? If the magazine is paying $500 to the defendant, why does it accept transportation both of less and different value than it would accept if it bought its tickets with money? Why embarrass itself with menacing pains and penalties for failure to observe all the conditions of the special contract, when by the use of cash, it may travel and give no concern to technical limitations?

It seems fair to conclude that either the advertising is of less than cash value, or the advertisers are grossly imposed upon by the railroad. It does not follow, however, that the transportation furnished under the contract set out is not furnished under substan-
85 tially similar circumstances and conditions as any other contemporaneous service. It is the same service—the same act of transportation as that furnished the public.

It is insisted by counsel for complainant that railroad tickets may not in any case under the interstate commerce act, as it now stands, be bartered as so much cash in payment of indebtedness of the railroad. By rule made effective September 15, 1906, the Interstate Commerce Commission has ordered that:

"Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether passengers or property or for any service in connection therewith, it being the opinion of the commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates in effect at the time, precludes the acceptance of services, property, or other payment in lieu of the amount of money specified in the published schedules."

In *United States v. A. T. & S. F. R. R. Co.* decided by Judge Wellborn of the Southern District of California recently (not yet published) it is said:

"A rate to be uniform in its operation, must necessarily be expressed in dollars or cents, * * * So to interpret the law as to allow the carrier to disregard said mode and to accept a part only of its compensation in money and the balance in a commodity, or by way of compromising a claim, would invite and open wide a door to the very discrimination which the statute were designed to suppress."

In *Union Pacific Ry. v. Goodridge*, 149 U. S. p. 680, the court had under consideration a demurrer to an answer setting up the satisfaction of what the court terms "an unexplained, indefinite, and unadjusted claim for damages in regard to which it says:

"While we do not undertake to say that a railroad company may not justify a fixed rebate in favor of a particular shipper by showing a liquidated indebtedness to such shipper, which the allowance of the rebate was intended to settle, it would practically emasculate
86 the law of its healthful feature to permit an unexplained, indefinite, and unadjusted claim for damages arising from a test, which, though litigated for some time, never seems to have been prosecuted to a final determination in the courts to be put forward as an excuse for a clear discrimination in rates."

and further on:

"To hold a defense thus pleaded to be valid, would open the door to the grossest frauds upon the law and practically enable the railroad company to avail itself of any consideration for a rebate which it considers *d*ufficient, and to agree with the favored customer upon some fabricated claim for damages which it would be difficult, if not impossible, to disprove."

"There is no doubt," says the court, "of the general proposition that a release of an unliquidated claim for damages is a good consideration for a promise, as between the parties, and if no one else were interested in the transaction, that rule might apply here; but the legislature, upon grounds of public policy, and for the protection of third parties, has made certain requirements with regard to equality of rates, which, if their practical application, would be rendered nugatory, if this rule were given full effect."

It will be noted that the contract does not require that the advertising must have been furnished before the transportation is given. There is no restriction upon the advertiser to call for his railroad tickets only so far as earned. He could, under the contract, demand them all at once if he chooses, and at the beginning of the term, before anything is earned. In the mere matter of interest, the rate would be less and different from that which is published.

In the case of *Motley, et al., v. Louisville and New Orleans R. R. Co.* 150 Fed. p. 406, Judge Evans sustained an agreement made on October 2, 1871, by the road with Motley and wife for the granting of passes for each of their lives in consideration of their release of their several claims for damages growing out of personal injury. In the course of his opinion p. 409), he says:

"Did Congress intend to abrogate such previously made contracts

founded upon valuable and legitimate consideration? Cer-
87 tainly, it did not say so. Was the abrogation of such pre-
existing contracts within the policy of the legislation referred to? There is nothing to indicate that it was, *although it is obvious that contracts of a similar nature could not be made after the act became effective.*"

It is of interest, in this connection, to note, as bearing upon the trend of congressional legislation, that on January 14, 1908, a bill was introduced in the United States senate to amend the law so as to permit public carriers to issue transportation in exchange for advertising, and that the bill was, by unanimous vote of the committee having it in charge, reported upon adversely.

Transactions such as those under consideration may not be open to the specific objection condemned in the Goodrige case, but they would seem to present just as convenient a device for evading the statute as the one there stated. So far as the record discloses, the particular matters here involved might not be open to this objection, but there is more included than the mere question of advertising. As said by Mr. Justice Brown in the Goodrige case, *supra*, "It" (the railroad) "is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, *and to put all its patrons upon an absolute equality.*"

The case does not come within the terms of the Goodrige case.
The suggestion of the court with reference to liquidated lia-
88 bilities does not apply to a situation where the indebtedness is by contract made payable only in transportation. In other words, here the railroad is not settling a liquidated liability, but is agreeing to settle a future liability with transportation.

There is no mistaking the trend of the law making and construing powers. Every new step is tending toward a most rigid enforcement of the rule that requires exact equality in the matter of rates. When by the Hepburn Act the word "different" was added to the words "greater or less," it is not unfair to assume that Congress intended to make the law more explicit and more difficult to evade. As was said in *Armour Packing Company v. United States*, 209 U. S. 56:

"The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published, and posted as required by law."

This purpose is even more apparent in the Hepburn Act. The plain intention is to close every avenue against discrimination. Bearing this in mind, the courts have not been, and will not be, disposed to hesitate in giving significance to changes in the language of the statutes as they occur from time to time. "The interstate commerce act," says the Supreme Court in the Armour case, "is not only to be read in the light of the previous legislation, but the purpose which Congress evidently had in mind in the passage of the law is also to be considered."

It is conceivable that a case may arise in which, from the nature of the facts involved, it might be difficult, if not impossible to say

whether the rate is greater or less than the published rate, which would, nevertheless, be covered by the term "different" within
89 the meaning of the whole act. It is essential to the spirit of the statute that the value of transportation be fixed and certain. In no other way can it be held to be exactly the same to all. If one person may purchase it with advertising, another with labor, and another with produce, the value which is a matter of agreement between the parties, how can it be *d*aid the schedule rate is always maintained? Would not the rate rest in the whim of the carrier? Such is not the intent of the law. To say to one man, "You must pay cash," and to his competitor, "You may pay in service or merchandise at prices we may agree on, be it more or less than the market prices, would seem clearly to constitute such a difference in transportation as is condemned by the act.

Some claim is made by defendant that the government's contention would exclude the use of checks and drafts and bills of exchange. This is without weight. In practical business usage, these instruments pass as cash. They are utterly free from the objections which attach to trade and barter and are clearly without the ban of the statute.

If the foregoing be correct, it follows that, both upon the particular record in this case and upon broad principles of law, the action of the defendant in the premises is in dissonance with the letter and spirit of the interstate commerce act. The injunction is granted as prayed.

(Endorsed:) Filed July 15, 1908, H. S. Stoddard, Clerk.

90 And afterwards to-wit: on the second day of September, being one of the days of the regular July term of said Court, 1908, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

Decree of September 2, 1908.

28711.

THE UNITED STATES OF AMERICA
vs.
THE CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY.

This cause came on to be heard at this term upon the petition heretofore presented to this court, together with the answer of the defendant thereto, and the replication to said answer, and the evidence taken herein and was argued by counsel.

By stipulation of the respective parties it was admitted that said defendant had, subsequent to the filing of said petition, executed contracts similar in terms to the ones set forth in said petition, expiring December 31, 1908, for the exchange of interstate transportation for advertising, under the same conditions as those set forth in the contracts described in said petition, and that said case should

be heard and determined precisely as if it were alleged in the pleading that said defendant had made said contracts expiring December 31, 1908.

And thereupon, upon consideration thereof, it was ordered, adjudged and decreed that the averments of said petition are sustained by the evidence herein, and that the acts of the defendant set
91 forth in said petition are a violation of the act to regulate commerce, approved Feb. 4, 1887, the act to further regulate commerce, approved Feb. 19, 1903, and the acts amendatory of said acts.

It was further ordered, adjudged and decreed that said defendant, its officers and agents, and any and all persons whomsoever, acting on its behalf, be and they are hereby enjoined from further executing each and every one of said contracts now pending for the exchange of transportation for advertising space; and that they be, and they are hereby enjoined from issuing transportation in exchange for advertising space pursuant to the terms of contracts providing that said transportation shall be paid for by the furnishing of advertising space in newspapers or periodicals, that they be, and they are hereby enjoined from accepting advertisements in lieu of money in payment for interstate transportation, pursuant to agreements or contracts providing that said advertising space shall be paid for by issuing transportation; and that they be, and they are hereby enjoined from committing any of the acts with reference to the exchange of interstate transportation for advertising space as charged in said petition. It is further ordered that said complainant have and recover from said defendant its costs to be taxed herein, including the fees of the Special Commissioner, for which let execution issue.

This decree shall extend only to the interchange of interstate transportation for advertising as defined in the Acts of Congress regulating foreign commerce and the amendments thereto.

The appeal as prayed is allowed and the injunction awarded by the final decree is suspended until the further order of the Supreme Court provided the transcript on appeal is filed in the Supreme Court within thirty days from this date. The penalty of the appeal bond is fixed at one thousand dollars, and leave is given defendant to file said bond within ten days from this date, the bond to be approved by the clerk of this Court.

The appeal as prayed is allowed in open Court.

92 And on the same day, to-wit: on the second day of September, 1908, there was filed in the clerk's office of said court in said entitled cause a certain certificate of evidence in words and figures following to-wit:

Certificate of Evidence.

In the Circuit Court of the United States of America for the Northern District of Illinois, Eastern Division.

#28711.

UNITED STATES OF AMERICA
vs.
THE CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY.

Be it remembered that at the hearing of the above entitled cause the complainant introduced in evidence testimony taken before G. Russell Leonard, Special Examiner in Equity and on file, herein, which testimony is by agreement of parties made part of this certificate of evidence with the same effect as if incorporated herein. Said complainant further introduced in evidence the tariff schedules published by said Chicago, Indianapolis and Louisville Railway Company and filed with the Interstate Commerce Commission, and effective throughout the period covering the transaction referred to in the petition and decree herein. Said tariff schedules showed the passenger fares between the stations of the said defendant, Chicago, Indianapolis and Louisville Railway Company. In said schedules said passenger fares are stated in all cases in dollars and cents. One of said fares so specified is:

"In either direction between Wallace Junction and stations shown below

Dist.	To	Rate
194.0.	Chicago.	$3.90."

93 The other fares provided in said schedules were in substantially the same form as the foregoing. In none of said schedules of passenger fares is there any reference whatever to advertising or advertising space, nor any statement that advertising or advertising space would be accepted under any circumstances as compensation for transportation.

Which was all the evidence offered or introduced in said cause.

To the end that the foregoing be made matter of record, said parties by agreement tender this certificate of evidence, and pray that the same may be signed and sealed, which is done accordingly this second day of September, 1908.

KOHLSAAT, [SEAL.]
Judge of the Circuit Court of the United States.

(Endorsed:) Filed Sep. 2, 1908, H. S. Stoddard, Clerk.

94 And on the same day to-wit: the second day of September, 1908, come the defendant in said entitled cause by its solicitor and filed in the clerk's office of said court its certain petition for appeal and assignment of errors in words and figures following to-wit:

Petition for Appeal and Assignment of Errors.

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

28711.

UNITED STATES OF AMERICA
vs.
THE CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY.

The defendant prays an appeal to the Supreme Court of the United States from the final decree entered herein and respectfully submits that the Court erred to-wit:

1. In adjudging that the Acts of the defendant complained of in the petition in any wise violated the acts to regulate commerce, approved April 4th, 1897, the acts to further regulate commerce, approved February, 1903, and the acts amendatory thereof.

2. In adjudging that the defendant was guilty of any discrimination forbidden by law either as to the execution of the contracts mentioned in the petition or the performance thereof.

3. In enjoining the defendant from paying for the advertising in transportation as provided and as agreed to in the contract or contracts mentioned in the petition.

4. In adjudging the issuance of any injunction whatever against the defendant.

5. In construing the Act of Congress in the petition and in the decree mentioned as in anywise forbidding the payment of
95 advertising with transportation at the filed and published rate as provided in said contract or contracts and as averred for defense in defendant's answer.

6. In holding that the interchange of advertising for transportation was prohibited or forbidden by the Act of Congress mentioned in the petition or in the decree.

7. In entering a decree in favor of complainant and against the defendant.

8. In not dismissing the bill of complaint.

The defendant prays the Court to suspend the injunction awarded by the decree during the pendency of said appeal in the Supreme Court.

G. W. KRETZINGER,
E. C. FIELD,
H. R. KUNIE,
Counsel for Defendant.

(Endorsed:) Filed Sep.. 2, 1908. H. S. Stoddard, Clerk.

96 And afterwards, to-wit: on the fifth day of September, 1908, come the Chicago, Indianapolis and Louisville Railway Company, as principal and Byron Cassell, as surety and filed in the clerk's

office of said court a certain bond on appeal in words and figures following to-wit:

97 Know all men by these presents, that we, Chicago, Indianapolis & Louisville Railway Company, as principal, and Byron Cassell, as sureties are held and firmly bound unto United States of America, in the full and just sum of One Thousand Dollars ($1000.) to be paid to the said United States of America, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this Second day of September in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Session of the Circuit Court of the United States, Northern District of Illinois, in a suit depending in said Court, between United States of America and the Chicago, Indianapolis & Louisville Railway Company, a decree was rendered against the said Chicago, Indianapolis & Louisville Railway Company, and the said Chicago, Indianapolis & Louisville Railway Company, having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said Chicago, Indianapolis & Louisville Railway Company, shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

CHICAGO, INDIANAPOLIS & LOUISVILLE
RAILWAY COMPANY, [SEAL.]
By BYRON CASSELL, [SEAL.]
Its Treasurer and Ass't Secretary.
BYRON CASSELL. [SEAL.]

Sealed and delivered in presence of

—— ——.

[SEAL.]

Approved by
H. S. STODDARD, *Clerk.*

O. K.
EDWIN W. SIMS,
U. S. Attorney.

[Endorsed:] United States Circuit Court, Northern Dist. of Illinois, Northern Division. —— —— *vs.* —— ——. Bond.

98 STATE OF ILLINOIS,
Cook County, ss:

Byron Cassell, on oath states that he signed the within bond as surety and that he is a resident householder of the Northern District of Illinois, and that he is worth over and above his just debts and liabilities the sum of five thousand dollars ($5000.)

BRYON CASSELL.

Subscribed and sworn to before me, this 2nd day of September, 1908.

[SEAL.] MARION S. LEAMING,
Notary Public.

(Endorsed:) Filed Sep. 5, 1908, H. S. Stoddard, Clerk.

99 *Præcipe for Record.*

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

28711.

UNITED STATES OF AMERICA
vs.
CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY.

To the Clerk of the above entitled Court:

You will please prepare transcript of the record in this Cause; to be filed in the office of the Clerk of the United States Supreme Court, at Washington, under the appeal heretofore perfected to said Court and include in the said transcript the following pleadings, proceedings and papers on file, to-wit:

Bill of complaint, filed June 20, 1907.
Appearance of Defendant entered July 31, 1907.
Stipulation extending time to answer.
Answer, filed September 16, 1907.
Order of March 16, 1908, referring cause to special examiner.
Testimony taken before special examiner.
Order of May 11, 1908, cause taken under advisement.
Opinion rendered July 15, 1908.
Decree of September 2, 1908.
Certificate of Evidence filed Sep. 2, 1908.
Petition for appeal and assignment of errors, filed Sep. 2, 1908.
Bond on Appeal, filed Sep. 5, 1908.

G. W. KRETZINGER,
Solicitor for Chicago, Indianapolis and Louisville Railway Company.

(Endorsed:) Filed Sep. 9, 1908, H. S. Stoddard, Clerk.

100 NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I, H. S. Stoddard, Clerk of the Circuit Court of the United States, for said Northern District of Illinois, de hereby certify the above and foregoing to be a true and complete Transcript of the proceedings had of record in said Court, made in accordance with the Præcipe filed in said Court on the Ninth day of September A. D. 1908, in the cause wherein United States of America, is the Complainant and the Chicago, Indianapolis & Louisville Railway Company, is the Defendant, as the same appears from the original Records and Files thereof, now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this Ninth day of September, A. D. 1908.

[Seal of Circuit Court U. S., Northern Dist., Illinois, 1855.]

H. S. STODDARD, *Clerk.*

Endorsed on cover. File No. 21,349. N. Illinois C. C. U. S. Term No. 553. Chicago Indianapolis & Louisville Railway Company, appellant, *vs.* The United States. Filed October 1st, 1908. File No. 21,349.

Supreme Court, U. S.
FILED.
NOV 26 1910
JAMES H. McKENNEY,

No. 74.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1910.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY,

Appellant,

VS.

THE UNITED STATES,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT FOR APPELLANT.

E. C. FIELD,
H. R. KURRIE,
SOLICITORS FOR APPELLANT.

BARNARD & MILLER PRINT, CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1910.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY,
Appellant,
vs.
THE UNITED STATES,
Appellee.
No. 74.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT OF THE CASE.

The appellee filed in the United States Circuit Court for the Northern District of Illinois its bill of complaint against the appellant, in which it charged that the plaintiff in error was a common carrier of freight and passengers for hire by rail, and as such engaged in interstate commerce. That the appellant entered into contracts with a number of publications, by the terms of which it

was to pay in transportation for advertising which it was to receive. It is averred in the bill that this contract amounted to a discrimination against persons who were charged cash for transportation, and that as the same contract was not given by all who desired to enter into the same, and that this also amounted to a discrimination against individuals. (Rec., 1-6.)

There is but one question in the case, and that is whether the railway company may contract for advertising at the actual value of such advertising and pay for the same with transportation issued at its published tariff rates. There is no averment here and no claim that the advertising secured by each of the contracts referred to was not actually worth what the railroad company was agreeing by its contract to pay for the same. The claim of the government is that transportation can only be issued where cash is paid, and that it cannot be issued in discharge of an obligation even though the obligation discharged is of the actual money value of the transportation given.

Evidence was heard, and at the final hearing the learned judge entered an order enjoining this plaintiff in error as prayed in the bill. The decree entered, provided in part as follows:

> "It was further ordered, adjudged and decreed that said defendant, its officers and agents, and any and all persons whomsoever, acting on its behalf, be and they are hereby enjoined from further executing each and every one of said contracts now pending for the exchange of transportation for advertising space; and that they be and they are hereby enjoined from issuing transportation in exchange for advertising

space pursuant to the terms of contracts providing that said transportation shall be paid for by the furnishing of advertising space in newspapers or periodicals, that they be, and they are hereby enjoined from accepting advertisements in lieu of money in payment for interstate transportation, pursuant to agreements or contracts providing that said advertising space shall be paid for by issuing transportation; and that they be, and they are hereby enjoined from committing any of the acts with reference to the exchange of interstate transportation for advertising space as charged in said petition." (Rec., 53.)

Plaintiff in error prayed an appeal which was allowed, and filed its assignment of errors.

ASSIGNMENT OF ERRORS.

"The defendant prays an appeal to the Supreme Court of the United States from the final decree entered herein and respectfully submits that the court erred, to wit:

1. In adjudging that the acts of the defendant complained of in the petition in any wise violated the acts to regulate commerce, approved April 4, 1897, the acts to further regulate commerce, approved February, 1903, and the acts amendatory thereof.

2. In adjudging that the defendant was guilty of any discrimination forbidden by law either as to the execution of the contracts mentioned in the petition or the performance thereof.

3. In enjoining the defendant from paying for the advertising in transportation as provided and as agreed to in the contract or contracts mentioned in the petition.

4. In adjudging the issuance of any injunction whatever against the defendant.

5. In construing the Act of Congress in the petition and in the decree mentioned as in anywise forbidding the payment of advertising with transportation at the filed and published rate

as provided in said contract or contracts and as averred for defense in defendant's answer.

6. In holding that the interchange of advertising for transportation was prohibited or forbidden by the Act of Congress mentioned in the petition or in the decree.

7. In entering a decree in favor of complainant and against the defendant.

8. In not dismissing the bill of complaint.

The defendant prays the court to suspend the injunction awarded by the decree during the pendency of said appeal in the Supreme Court. (Rec., 55.)

THE ISSUES.

In the bill there are general averments that the appellant is a common carrier by rail, engaged in interstate commerce. That on January 24, 1907, it entered into a contract with the Frank A. Munsey Company, by the terms of which that company agreed to give one page of advertising in its publication, Munsey's Magazine, in exchange for $500 worth of transportation over the line of the appellant. This contract is in the record, and is as follows:

Agreement between the Monon Route (Chicago, Indianapolis & Louisville Railway Company) and .....Frank A. Munsey Co..... publisher. Entered into this....24 day of January, 1907.

WHEREAS, the said publisher issues.....Munsey's Magazine .....a.....publication, published at New York City, N. Y., Chicago office 423 Marquette Building, and which has a regular circulation of .....643,000.....each issue,

AND WHEREAS, the said Monon Route desires to advertise in said publication, which advertising the said publisher agrees to do upon the following terms and conditions, which are mutually agreed upon:

1st. The said publisher agrees to publish in said publication an advertisement of the Monon Route as follows:.....One page "ad" (divided as desired).....
.....
.....
said advertisement to appear....Favorably....and occupy a space of not less than....One page.... and to be published as desired issues of said publication.

2d. In full consideration of the foregoing advertising, the Monon Route agrees to issue the following nontransferable transportation based on regular published rate:
.....Trip tickets or mileage.....
.....
To the value of....Five hundred.....Dollars ($500...), for the personal use of the publisher, his employes or immediate members of his or their families, which said transportation shall be limited for use not later than December 31, 1907.

3d. Under no circumstances must the transportation issued under this contract be sold or transferred to or used by any other than the person to whom issued, as such sale, transfer or use would be a misdemeanor under the law.

4th. It is understood and agreed that the transportation issued under this contract shall be read to points on the Monon Route, and not to points on any other road.

5th. No extension of time on any transportation issued under this contract shall be given by the Monon Route or requested by the publisher beyond the date of the expiration of this contract.

6th. In case said publisher severs connection with said publication or sells or transfers his interest therein, then said transportation shall at once be surrendered to the Monon Route, and no new transportation shall be issued on account of said publication until after that originally issued has been returned to the Monon Route. Should any person holding transportation issued hereunder, sever connection with the publication or should the publica-

tion suspend, or if the transportation should be presented by any person other than the one named thereon, then the Monon Route will refuse to honor the same for passage, and take the same up and collect full fare, and such presentation shall be taken as a breach of contract: and it is hereby agreed that the suspension of said publication before the expiration of this contract, or the presentation of non-transferable transportation by any other than the person named thereon shall cause this contract to be void and operate as an offset to all transportation which might be considered as due the said publisher. Further, should said publisher or any person named on said tickets allow any other person to use same or offer to sell, sell or transfer the same, then said publisher agrees to pay the said Monon Route as a penalty the full rate of fare which would have been paid for regular tickets.

7th. The said publisher further agrees to deliver to said Monon Route, at its general office in Chicago, one copy of each issue of said publication in which advertisement appears, free of charge, during the life of this contract.

8th. This contract expires December 31, 1907, unless otherwise stipulated.

It is also averred that up to May 10, 1907, the railway company had issued $145.10 worth of transportation under said contract, and had received one-fourth of a page of advertising in said magazine, which was valued by each of said companies at $125. That while issuing the said transportation the defendant did sell transportation to others, and exacted and received money therefor at its published rates. That the transportation service in each case was the same, and the circumstances and conditions pertaining to such transportation the same in each case.

That the appellant is furnishing transportation to

the publisher, the members of his family and his employes under said contract, and has entered into contracts with 251 other publications, by the terms of which it issues and gives transportation for advertising under substantially the terms and conditions set forth in the said Munsey contract. That during this time the rates, fares and charges of said company, are by the terms of its tariffs published and filed, payable in money only; but notwithstanding this, the defendant does not receive money from any of the persons using the transportation issued under said contracts.

That by reason of these facts the appellant is receiving rates which are less and different than the rates, fares and charges specified in its tariffs, and the rates, fares and charges for a like and contemporaneous service exacted of others.

> "That although, in every instance, the rates for the interstate transportation of passengers over said defendant's said railway, made in the schedule of rates, fares and charges, published and filed by said defendant as aforesaid, and, by the language of said schedule, made payable in money, yet said defendant does not, in any instance, receive payment in money for any interstate transportation furnished or any interstate transportation service performed by it as aforesaid, where it furnishes such transportation or performs such transportation service under and in accordance with said contract." (Rec., 5 and 6.)

In the prayer of the bill of complaint it is prayed that on the final hearing of the court, it

> "will forbid the further execution by the said railway company of the terms of each and every of said contracts, and will enforce an ob-

servance by said railway company of its published tariffs by directing and requiring the discontinuance of the unlawful practice of accepting advertisements in lieu of money in payment for interstate transportation." (Rec., 6, par. 5.)

We think it is important to observe that there is no averment that the amount which the defendant is paying the Munsey Company, or is paying any of the other publications with which it has contracts as averred in the bill is more than the money value of the advertising which it receives for the transportation so given. There never has been any claim, so far as we know, that the amount paid in each instance for advertising was not equal to the value of the transportation given.

In the answer it is admitted that the contract set out in the complaint, and the others there referred to, had been entered into by the appellant. That in each case appellant had only agreed to pay the regular rates for its advertising, which were the rates charged advertisers paying cash.

That in each case the money value of the transportation to be issued under said contracts was to be paid by the several publications giving appellant advertising in such publications.

The contract was made in January, 1907, and expired December 31, 1907. The execution of this contract and the other contracts entered into with other publications was admitted in the answer to the bill of the complainant. In the answer it was averred that the money value of the space contracted for with the Munsey Company was worth five hundred ($500) dollars, and that this valuation for such space was the same rate fixed by the Munsey Company and exacted from the public generally in that magazine.

THE EVIDENCE.

The western manager of the Munsey Company for twenty-five (25) years testified respecting the rates for publication in that magazine as follows:

> "When we first started I am under the impression that it was about Fifty ($50.00) Dollars a page. The circulation was about 75,000. I think the next increase was to One Hundred ($100.00) a page. That was about twelve, thirteen or fourteen years ago. About the time we reached 300,000 or 400,000 the rate was about Two Hundred Fifty ($250.00) a page. That must have been twelve years ago at least. Then my recollection is that when we reached a half a million, that was about ten years ago, then the rate was advanced to Four Hundred ($400.00) Dollars a page. I think it is about eight years ago, the circulation having reached beyond 600,000, the rate was advanced to Five Hundred ($500.00) Dollars a page, and it has been that ever since." (Rec., 23.)

Arthur E. Wallace, a witness on behalf of the Government, testified that he was manager of the Criterion Publishing Company, which published Mida's Criterion. That he had a contract with the plaintiff in error for advertising in exchange for transportation in the year 1907. That the advertising rates of his publication are standard and strictly adhered to. Higher rates are charged for special positions than are charged for less desirable ones. The contract with this railway company gave it a quarter of a page. According to our regular rates the charge for this would be $240, but the contract in this case provides for this service for this railway company for $200. This is the rate which has been carried along in the case of this advertising for a number of years. (pp. 15-16.)

In answer to the question of counsel for plaintiff in error, this witness testified:

Q. State whether the charge which you made to the Monon for the advertisement in question was the fair and reasonable cash price of that advertisement at the time it was made?

A. It was.

Q. You may state whether or not it has remained a fair and reasonable cash charge up to the present time.

A. It has. We would not have taken any less if they had paid cash instead of transportation.

S. J. Walpole testifies for the Government that he is business manager of the American Field. That he had a contract with the Monon for advertising in 1907. Our publication is a weekly publication. We have rates for advertising which run for different lengths of time.

In answer to the questions of counsel for the plaintiff in error, this witness testified:

Q. Now, Mr. Walpole, you may state whether the amount that the Monon contracted to pay for that advertising was the fair, reasonable cash market price of that advertisement?

A. It was the rate that was in effect when the arrangement was made.

Q. Well, you have not quite answered the question.

The question was re-read.

A. Yes.

Q. And is that true up to the present? Of its

being the fair reasonable cash market price of that advertising?

A. Yes. (pp. 21-22.)

Gertrude Goldberg testified on behalf of the Government that she was manager of the Chicago Israelite, a weekly publication, and that her paper had a contract with the Monon for advertising in 1907. Our rates were from five to ten cents a line. The solicitor would get the best rate that he could. We tried to have a fixed rate, but the solicitor had a little option in securing contracts. We have had a contract with the Monon for a good many years, and have never raised the rate on that company. The rate to the Monon is just about the same as our cash rate proves to be. We have some contracts at present as low as the Monon rate.

On cross-examination this witness testified:

Q. And I want to ask you now whether the price you made to the Monon on that advertisement was a fair and reasonable cash price for the same?

A. Yes, sir, we made no difference with any ads that we took for the railroad for trade. Their prices are just the same since we have gotten them for cash. (p. 31.)

George Wilkes, a witness called in behalf of the Government, testified that he is business manager of the Chicago Horseman Newspaper Company. Our people had a contract with the Monon for advertising in 1907. We furnished all of the advertising called for by the contract, but did not receive all of the transportation. We did not call for the transportation as we did not have occasion to use it. The Monon paid our regular card rates. At times

we have to grant concessions from these in order to get business, but we endeavor to maintain these rates. (pp. 34-39.)

Cross-Examination.

Our card rate is our regular rate. The regular rate was not applied to the Monon in this case. Through an error the contract was made at a little less than the regular rate, but the matter was allowed to stand. (p. 40.)

Edwin T. Johnson, witness for the Government, testified that he published the National League Score Card in Chicago. We carried an advertisement in this card for the Monon in 1907. The Monon took a quarter page, the price of which is $50. We did not charge the same rate to all classes of advertisers. The rate with the Monon corresponded, for the most part, with the rates made to others. I had no contract with the Monon in 1907, but I published the card in compliance with a request on the part of Mr. Murphy. I received nothing for it. The ad was actually worth $50. In fact, that was very cheap for it, considering the fact that it runs the entire season. In 1908 I made a contract by the terms of which I was to get $50 in transportation for this card. Transportation suits me as well, as I have to use the Monon more than that amount of transportation equals during every year. The rate which the Monon pays is a fair price for any one, and much more is paid by many for the same space. (pp. 41-43.)

The above testimony the government itself introduced, and there is no other evidence in the record

respecting the rates for publication in those magazines.

It appears from this record that in every instance the amount which the plaintiff in error agreed to pay for its advertising was a reasonable and fair cash value of the same, and that payment was made in the transportation over the lines of plaintiff in error at its lawfully published tariff rate.

There is no question, therefore, on this record but what these transactions were fair and *bona fide;* that the advertising was worth the price at which it was contracted; that the payment for the same in transportation was given at the same rate every other member of the public was required to pay for it and according to the tariff schedule. In a word, the money value of the one was the equivalent of the money value of the other. There is no pretense made in the bill of complaint that any of the litigated contracts were colorable, or made to effect an unreasonable preference, or to accomplish an unreasonable discrimination. What the bill of complaint charges is that the legal effect of these contracts, no matter how fair and reasonable they are, and no matter if the value of the service rendered by the publisher is the fair cash market of the same, and no matter if the publisher's services are actually paid in transportation at the lawfully published rate, the transaction is to be legally condemned because under the law transportation charges cannot be legally paid in anything but money.

THE DECISION OF THE TRIAL COURT.

The learned trial judge thus states the question at issue, as he understood it:

> "Practically the question submitted is whether transportation supplied in accordance with the terms of the contract constitutes a rate greater or less than, or different from, that given the general public. The question as to the value of the advertising is a contested one. Manifestly there can be no fixed price placed upon it. The number of copies issued, the character of its subscribers, and very many other questions enter into the estimate of its worth. It is, therefore, impossible to say what its cash market value is, except by comparison with other advertising rates. It cannot be said that the evidence is either conclusive or even convincing upon that point. Indeed, if it is taken at its cash value, why should the transportation be limited as specified in the contract? If the magazine is paying $500 to the defendant, why does it accept transportation both of less and different value than it would accept it if it bought its tickets in money"

In this language, and a considerable part of the opinion, the learned judge seems to assume that there is in this case, as an issue of fact, the question of whether the transportation provided for by the contract set out in the bill, is issued in exchange for its money value in advertising. As we have shown there is no such question in this case. It is admitted by the silence of the bill that the actual value of the transportation given is received by the railway company. It does not seem to us that it will do to say that the value of the advertising is a contested one, or that the evidence here fails to show that plaintiff in error does not receive its published rates

for all transportation issued. There was no issue of this sort in the case.

The bill was intended to, and does, present the sole question of whether a railway company can receive money value in payment for transportation. It never has been our claim that the mere fact that we agreed to pay $500 for advertising foreclosed inquiry into our act in giving that amount of transportation in liquidation of the debt. It is clear that such a transaction cannot be used to cover a departure from a lawful rate. What we do claim is that where the transaction is *bona fide,* where the actual value of the transportation given is received by the carrier, and that fact is admitted, as it is here, there is no violation of the law in the mere fact that value in service was received, instead of the same value in money.

We believe that the opinion of the learned judge shows that he was influenced very largely by his erroneous assumption, that the question before him was one of whether actual value had been received; and not the true issue, that is, assuming that it had was the law violated, because not received in money.

It is suggested by the learned judge that the transportation may be demanded under these contracts before the service is given, and the element of interest might become an important one. It is now too well settled for controversy that there is nothing in the law which prohibits a carrier extending credit in one case, and refusing it in another.

The learned judge then enters into a discussion of the order entered by the Interstate Commerce Commission, which order is as follows:

> "Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether passengers or property, or for any service in connection therewith, it being the opinion of the commission that the prohibition against charging or collecting a greater or less or different compensation, than the established rates in effect at the time, precludes the acceptance of services, property, or other payment in lieu of the amount of money specified in the published schedules."

Speaking to the principle thus stated the learned judge says:

> "It is essential to the spirit of the statute that the value of the transportation be fixed and certain. In no other way can it be held to be exactly the same to all. If one person may purchase it with advertising, another with labor, and another with produce, the value of which is a matter of agreement between the parties, how can it be said that the schedule is always maintained? Would not the rate rest in the whim of the carrier?"

The case of *Union Pacific Railroad Company* v. *Goodridge,* 149 U. S. 680, was largely relied on by counsel in the lower court, and doubtless will be here. It is referred to by the learned trial judge in his opinion, and with reference to it he says:

> "Transactions such as those under consideration may not be open to the specific objection condemned in the Goodridge case, but they would seem to present just as convenient a device for evading the statute as the one there stated. So far as the record discloses, the particular matters here involved might not be open to this objection, but there is more included than the mere question of advertising."

We do not believe that the Goodridge case is at all

in point here. There it appeared that there was a rate of $1 per ton on coal from a near-by station to Denver. The laws of that state provided that the same rates should be made to all under the same conditions, and that if this was not done, the party injured might recover treble damages. The Goodridge firm brought suit against the railroad company to recover treble damages, it being averred that one of its competitors in business had been given a secret rebate of 40 cents per ton from the established rate. In answer it was claimed that this difference was made in settlement of certain claims which the competitor had against the railway company. In stating the nature of the demands and objections to the defense the court, speaking by Mr. Justice BROWN, says:

> "While we do not undertake to say that a railroad company may not justify a fixed rebate in favor of a particular shipper by showing a liquidated indebtedness to such shipper, which the allowance of the rebate was intended to settle, it would practically emasculate the law of its most healthful feature to permit an unexplained, indefinite and unadjusted claim for damages arising from a tort, which, though litigated for some time never seems to have been prosecuted to a final determination in the courts, to be put forward as an excuse for a clear discrimination in rates."

In some ways at least this decision does support the claim of the appellant here. The decision of the learned judge in the case at bar is to the effect that nothing but money can be received in payment for transportation. The Colorado law requiring the same charges to all, was substantially the same in this respect as the Interstate Commerce law,

and if the decision there to the effect that a liquidated claim, an ascertained indebtedness could be settled by allowing a rebate, then the decision of the trial court and the Commission is, as to such claims, contrary to this decision.

However, it is evident that the obligation in this case is entirely different from that attempted to be settled in the Goodridge case. Here we are dealing with a commodity which for practical purposes has a fixed market value. We do not believe that it can be claimed that where, as here, a publication has a fixed rate for advertising, and a railway company buys it at this rate, or for less, and at the same rate at which it is being sold to others at the time, it can be said that full money value is not being received.

Of course, when we come to consider the exact issue here presented, and recall the fact that it is admitted here that full money value was to be received in each case, then it seems to us that the Goodridge case above quoted supports our contention here. No one would claim that if the plaintiff in that case in a reply had admitted that the claim settled was worth all or more than the amount fixed, and that the railway company in that way did receive in money value the full published rates, that the court would have held that the defense to be insufficient. That is the case here, and with this authority and this admitted fact in the case at bar, there is express warrant for this contract in that decision.

Counsel for the government also relied upon the case of *United States* v. *A. T. & S. F.*, 163 Fed. 111 (decided by Judge Welborn, district judge), and this decision is referred to by the learned judge in his

opinion. However, it is based largely on the Goodridge case, which, as we have seen, the learned judge here holds not to present the question arising in the case at bar.

However, it is of more than passing interest to observe that the Circuit Court of Appeals in its decision reverses the decision of Judge WELBORN, 170 Fed. 250.

The Court of Appeals does not refer particularly to the language of his opinion relied upon by counsel here, and quoted in the opinion. But the court does disagree with the reasoning which led to his conclusion, and, hence, reverses his decision.

THERE IS NO UNREASONABLE DISCRIMINATION IN CONTRACTING WITH CERTAIN PUBLICATIONS AND REFUSING TO DO SO WITH OTHERS.

When this case is considered upon principle it does not seem to us that the decision of the trial court can be sustained. The burden of the argument of the government has been that any transaction which might be used to evade the law against discrimination is prohibited by the commerce act.

Section 1 of the commerce act, as amended in 1906, defines the commerce to which the act shall apply, and prohibits issuing free transportation except to certain classes of persons there indicated.

Section 2 prohibits a carrier charging one person or corporation "a greater or less compensation" than is charged another for a like service, "under substantially similar circumstances and condition."

Section 3 provides that no carrier shall give "any undue or unreasonable preference or advantage" to any person, locality or traffic.

All of these sections of the law recognize the right of a carrier to discriminate between persons, the only restraint upon such discriminations being that they shall not be "unreasonable discriminations".

It has been repeatedly held by this court, and other courts having jurisdiction, that there may be discriminations, and that unless they are unreasonable under the circumstances and conditions, the law is not violated at all.

Indeed, there is in the law itself the exception of many cases, such as free passes to employes, when in reality there would be no violation of the law by making such discrimination, even though the act made no special provision for it.

Speaking of the effect of this law upon the right of a carrier to make contracts, the court in *Cincinnati, etc.*, v. *Interstate, etc.*, 162 U. S. 197; 40 L. Ed. 939, says:

> "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate" * * * against "persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free * * * to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests, upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

In the case of *Interstate, etc.*, v. *Baltimore, etc.*, 145 U. S. 263; 36 L. Ed. 699, the court says of Section 22 allowing free transportation, and of the long and short haul clauses, that they are but exceptions which might be allowed, under Sections 2 and 3, be-

cause the circumstances are dissimilar, if they were not specially provided for in these other sections. In other words, they were but illustrations of dissimilar conditions, and were not exclusive.

> "It does not follow, however, that there may not be other classes of persons, in whose favor a discrimination may be made without such discrimination being unjust. In other words this section (22) is rather illustrative than exclusive, Indeed, many if not all, the excepted classes named in Section 22, are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers."

Speaking at another place in this opinion:

> "In respect to passenger traffic, the positions of the respective persons, or classes between whom difference in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and of services, accompanied by irregularity and partiality, resulting in undue advantage to one, or undue disadvantage to the other in order to constitute unjust discrimination."

The case of *Northern Pacific* v. *Adams,* 192 U. S. 440; 48 L. Ed. 513, is an illustration of another exception. There an interstate free passenger not within the exceptions of Section 22, had released the company from liability as a consideration for his free carriage. In holding the release to be valid the court, on page 454, says:

> "So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby."

> "The mere circumstance that there is in a given case a preference or advantage does not, of itself, show that such preference or advantage is undue or unreasonable, within the meaning of the act. Such questions are not of law, but of fact."
>
> *Texas & Pacific* v. *I. C. C.*, 162 U. S. 197, 220.

The principle of these decisions has bearing upon a question which will be raised by the government. It was urged by the government in the trial court that as this contract was not entered into with all who might desire it, but only with such publications as the plaintiff in error selected, this constituted a discrimination. We say that there is nothing in the act which in terms prohibits this, and certainly it cannot be said that a railway company is exercising unreasonably a right which it has, in not making a like contract with any one who desired it. Even though it might be said that the railway company was discriminating between publications, it is no more unreasonable than the exercise of the right to buy rails of one, and refuse to buy them of another.

The argument proceeds upon the theory that there is the right to so contract, if a like contract is given to all. It would not be unreasonable to suppose that the entire surplus of a railway company might be wiped out by the demand of publishers for advertising. Thus the right to make the contract is coupled with such an obligation as to make the exercise of the right destructive of the corporate solvency.

There is nothing here in the record to show that there was any discrimination of this kind by the appellant. However, the appellant does insist that

it has the right to make this kind of a contract with publications of its own selection, provided, always, that it actually receives the money value of the transportation which it gives.

Advertising is just as essential to successful operation as good train service. The right to attract business is, indeed, the right to exist. It cannot be presumed that the exercise of this right is to be destroyed by imposed obligation to extend it to all. No case has been cited in which the claim has been made that Congress has ever attempted to dictate to railways either of whom or what they shall buy in the maintenance of their property. Nor has there been any claim of injustice to the public in the fact that railways have the same right as individuals in the maintenance of their property and conduct of their business, to buy whatever in the judgment of the managing officers is needed, and to buy it wherever they may choose. The equal rights and privileges clauses of the law do not extend to anything except transportation service, and the incidents thereof.

SECTION SIX DOES NOT REQUIRE THE MANNER IN WHICH CHARGES SHALL BE PAID TO BE STATED IN THE TARIFFS FILED BY A CARRIER.

The particular section of the Commerce Act relied on by the government to sustain its claim is Section 6. This section requires carriers to file with the Commerce Commission printed copies of the rates, fares and charges, stating separately terminal and other special charges, and also stating all terms and conditions which are to apply.

Section 6 has always related alone to the *manner*

in which rates should be put in effect, and changed. It does not require the same charge to all, nor prohibit unjust discrimination. Its purpose has always been to render effective the general restraints upon the amount of the charge contained in sections two, three and four. It requires a record, open to all. This record must be adhered to. It amounts to a positive law as between the parties in so far as it contains the things which the statute requires. If the carrier puts in it things not required, there is no restraint upon a departure therefrom as to these non-essentials.

In most respects Section 6, is the same now as it has been since 1887. The amendment extends the rule to all joint as well as local rates, and makes some difference in the manner in which rates shall be changed. The requirement is that there shall be filed with the commission and kept for public inspection schedules "showing all the rates, fares and charges" for the service, also "all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect or determine any part of the aggregate of the aforesaid rates, fares and charges, or the value of the service rendered the passenger, shipper or consignee."

In other words, it shall state the rate, as well as every privilege or burden which it gives in addition to mere carriage.

Section six does not now, and never has required that every thing which will occur affecting the shipment shall be stated in the tariff

In this connection we refer to the case of *Interstate, etc.*, v. *Detroit, etc.*, 167 U. S. 633; 42 L. Ed.

306. In this case it appeared that the railway furnished free cartage at one town, but did not at another. The published tariffs made no provision for free cartage. Speaking to this point the court said:

> "It may well be doubted whether cartage, when furnished without charge, comes within the meaning of the phrase 'terminal charge' or can be regarded as a 'rule or regulation' which in any wise changes, affects or determines any part of the aggregate of the rates, fares and charges."

The court disposes of the contention that it must be published with the foregoing statement. From this it is clear enough that it is only the things indicated that need be stated in the tariff, and, it follows that a departure from these alone is prohibited.

It has recently been held that the route beyond the line of the initial carrier of a shipment handled on a joint rate, need not be stated in the tariff.

> *So. Pacific* v. *Interstate, etc.,* 200 U. S. 536, 50 L. Ed. 585.

It has been held that the time when charges shall be paid is not required to be stated; and that the carrier may require one shipper to pay in advance, and allow another to pay at destination, and that by so doing it does not unjustly discriminate.

This point is decided, and a number of principles here important are well stated in the case of *Little Rock, etc.,* v. *St. Louis, etc.,* 63 Fed. 775. Speaking there at page 777, the court says:

> "At common law a railroad corporation has an undoubted right to require the prepayment of freight charges by all its customers, or some of them, as it may think best. It has the same

right as any other individual or corporation to exact payment for a service before it is rendered, or to extend credit. *Oregon Short Line & U. N. Ry. Co.* v. *Northern Pac. R. Co.*, 51 Fed. 465, 472. Usually, no doubt, railroad companies find it to their interest, and most convenient, to collect charges from the consignee; but we cannot doubt their right to demand a reasonable compensation in advance for a proposed service, if they see fit to demand it. This common law right of requiring payment in advance of some customers, and of extending credit to others, *has not been taken away by the interstate commerce law*, unless it is taken away indirectly by the inhibition contained in the third section of the act, which declares that an interstate carrier shall not 'subject any particular person, company, corporation or locality * * * to any undue or unreasonable * * * disadvantage in any respect whatever.' This prohibition is very broad, it is true, but it is materially qualified and restricted by the words 'undue or unreasonable.' One person or corporation may be lawfully subjected to some disadvantage in comparison with others, provided it is not an undue or unreasonable disadvantage. In view of the fact that all persons and corporations are entitled at common law to determine for themselves, and on considerations that are satisfactory to themselves, for whom they will render services on credit, we are not prepared to hold that an interstate carrier subjects another carrier to an unreasonable or undue disadvantage because it exacts of that carrier the prepayment of freight on all property received from it at a given station, while it does not require charges to be paid in advance on freight received from other individuals and corporations at such station. So far as we are aware, no complaint had been made of abuses of this character at the time the interstate commerce law was enacted, and it may be inferred that the particular wrong complained of was not within

> the special contemplation of Congress. This being so, the general words of the statute ought not to be given a scope which will deprive the defendant company of an undoubted common law right, which all other individuals and corporations are still privileged to exercise, and ordinarily do exercise."
>
> *Oregon, etc.*, v. *Northern, etc.*, 51 Fed. 465, 472.

The statute indicating what shall be stated in the tariffs,—we say that alone need be—and when it is required that the rate and character of the service is to be given shall be stated, *it does not follow that either the time when, or the manner in which payment shall be made need be given.* These are essentially different facts, and the statement of the *amount,* in no way implies the *manner* in which payment shall be made. The right asserted is statutory. The violation, if it be one, is punishable with heavy penalties, and the act is to be read out rather than read in the statute by interpretation.

Looking at these provisions alone, and regarding this as a statute not only highly penal, but in derogation of the common law, it is utterly against principle for it to be asserted that this requirement that the carrier state in its tariff the *amount* to be paid requires it also to state the *manner* in which it shall be paid.

As the amount of the debt to arise need alone be stated, we say that even if the tariff did provide that the debt, after arising, should only be liquidated with cash, the carrier could depart from it, as this statement in the tariff would be superfluous.

By an amendment in 1906 it is claimed that Sec-

tion 6 was changed so as to require all charges to be paid in cash. As amended Section 6 provides that no carrier "shall charge or demand or collect or receive a greater or less or *different* compensation" than "the rates, fares and charges which are specified in the tariff filed and in effect at the time."

The word "different" in the clause quoted, is in the amendment, but not in the original act. This, the commission has said in its general order, prohibits payment of rates in anything but cash.

Of itself this involves an admission that in the opinion of the commission cash payment was not required by the original act. Nor is this long standing construction to be passed lightly. This court has held that the construction put upon an Act of Congress by the department charged with its execution, is entitled to great weight. This rule is well stated in the case of *United States* v. *Alabama, etc.*, 142 U. S. 615; 35 L. Ed. 1134, where, at page 1136, the court says:

> "We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department; a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case,—should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

To the same effect see:

United States v. *Union Pacific,* 148 U. S. 562; 37 L. Ed. 560.

United States v. *Hill,* 120 U. S. 169; 30 L. Ed. 627.

So that this interpretation of the original act during a term of nineteen years, is of great weight in the decision of the question of whether before 1906 charges were required by law to be paid in cash.

When we consider the meaning of the word "different," and those with which it is associated, the legislative intent is made manifest.

The courts have had frequent occasion to define these words.

> "Compensation" is an equivalent for property taken or an injury done.
>
> *James* v. *Turner,* 9 Leigh 313, 340 (Va.).

> "Compensation" means a "recompense given for a thing received."
>
> *Long* v. *Railway,* 126 Pa. 143; 19 Atl. 39, 40.

> "Compensation consists in giving back an equivalent either in money, which is but the measure of value, or in actual value otherwise conferred."
>
> *Winona, etc.,* v. *Denman,* 10 Minn. 267, 280.

> "The primary significance of the word compensation is equivalence, and the second or more common meaning is something given or obtained as an equivalent."
>
> "Compensation. In Spanish Law. The extinction of a debt by another debt of equal dignity between persons who have mutual claims on each other." Bouvier's Dictionary.

"Compensation. In Chancery Practice. Something to be done for or paid to a person of equal value with something of which he has been deprived by the acts or negligence of the party so doing or paying." Bouvier's Dictionary.

"Compensation. In Civil Law. A reciprocal liberation between two persons who are both creditors and debtors of each other." Bouvier's Dictionary.

"Compensate. To give an equivalent, or recompense; to pay for; requite; remunerate; as to compensate one for his services; especially, an equivalent in value or the like." Webster's Dictionary.

These authoritive definitions of the words used in section six, of themselves, if accepted by this court, refute the contention of the government. The requirement is that "all the rates, fares and charges" shall be shown by published tariffs, and no carrier shall receive a "greater or less or different compensation" than the "rates, fares or charges" thus indicated. There is not here any claim that the words "rates, fares or charges" mean payment in money only. The reason for it is that in this respect the wording of the section was not changed, and the commission finds not in the original law, but the amendment the reason for its decision. The practical interpretation given by every department of the government is that the law did not prohibit the payment in money value in 1906. The prohibition is against collecting greater, less or different "compensation." Compensation has never been defined to mean money, but simply the equivalent in value. It must be money to be a legal tender, but the parties by contract may substitute anything as an equivalent. But it is "different compensation" than the

"rates, fares and charges." It thus conclusively appears that the word compensation is used in the identical sense as "rates, fares and charges." If it could have a broader meaning, then it is here limited to this, for it is only an inhibition from a departure from the rates, fares and charges. If, as defined by the authorities "compensation" means the equivalent in value, then the prohibition is simply that no higher, lower or different value shall be accepted from one than the other.

IT HAS ALWAYS BEEN THE LAW THAT CHARGES MAY BE PAID IN MONEY VALUE AS WELL AS IN MONEY.

Indeed, we may go further, and say that the fact that such charges were not always required to be paid in money, but might be paid in a claim for damages, has become a fixed rule of law. It is generally held to be the law that a consignee may set off against a claim for freight charges, any damage to his shipment against which the charges are assessed; and if the claim is equal to or greater than the freight charges delivery may be required without the payment of any part of the charges.

Marsh v. *Union, etc.*, 9 Fed. 873.
Miami, etc., v. *Port Royal, etc.*, 25 S. E. 153.
Gleadell v. *Thompson, etc.*, 56 N. Y. 194.
Bearse v. *Ropes*, Fed. Cas. 1192.
Snow v. *Carruth*, Fed. Cas. 13144.
Bancroft v. *Peters*, 4 Mich. 619.
Relyea v. *New Haven, etc.*, 42 Conn. 579.
Boggs v. *Martin*, 13 B. Mon. 239.
Page v. *Munroe*, 18 Fed. Cas. 10665.
Jones v. *Hoyt*, 25 Conn. 374.

Aldrich v. *Cargo,* 117 Fed. 757.
Success, 7 Blach. 551.
Woodward v. *I. C.,* 1 Biss. 403.
Elliott Ry. 2d Ed. 1558.
Mo. P. v. *Peru, etc.,* 87 Pac. 80; 85 Pac. 408.

In the case last cited the discussion is thorough and the decisions are reviewed. It cannot be that in litigation a rule of law will be applied compelling the carrier to accept satisfaction of a claim for damages in payment of charges, and yet, *before litigation* the parties are denied the capacity by contract to accomplish the same end.

Furthermore, it is held by the Court of Appeals of this circuit in the case of *United States* v. *Chicago, etc.,* 127 Fed. 785, that the law before amendment did not require cash payment. In that case it was claimed by the government that it was entitled to the ten-party rate on transportation of its troops. The defendant claimed that as the government did not pay cash, but gave orders requesting the service, which orders were sent to the proper department for auditing and payment, and which were only paid after delays for verification, and after extended correspondence, the conditions were dissimilar with those where payment was made on delivery of the ticket. That this justified a refusal of the lower rate to the government. This Court of Appeals sustains this contention, in part saying:

> "*Fifth.* Another material difference is that those who travel by these party rates pay cash in advance, while the government does not. On the contrary, the service must be first rendered, and claims for the same filed at Washington, and undergo examination, and be audited by the

> War and Treasury Departments, and payment indefinitely delayed. This must always constitute a material difference, so long as commodities can be sold cheaper for cash than on credit. It is quite probable that, if the government would pay cash for the service performed, the railroad companies might afford to make a corresponding deduction in rates."

It is interesting to observe that every branch of the national government at this day that has occasion to secure freight or passenger transportation at the expense of the government is yet securing it in the same way as it was being done at the time of that decision.

The Supreme Court of Kansas held that transportation might be paid for in money or "other valuable considerations."

> *Curry* v. *Kansas, etc., Ry. Co.*, 48 Pac. Rep. 579.

The New York Court of Appeals held that transportation might lawfully be paid for "in services."

> *Dempsey* v. *New York Central*, 40 N. E. 867.

Chicago & Alton Ry. Co. v. *United States*, 156 Fed. 558, involved the precise question here presented.

S. & S. Company, a packing corporation, owned and controlled certain tracks, switches and sidings, aggregating a distance of about a mile and a half. It was allowed a refund of terminal charges of about one dollar on each car for the use made of the S. & S. tracks in getting the S. & S. Co.'s cars of freight upon the Belt Line's tracks.

The court said (p. 560):

> "S. & S. received back a part of the money they paid the Alton for freight. That fact alone does not prove that the transaction constituted a rebate within the definition of the statute. A railroad may pay its lawful indebtedness to a shipper out of the money the shipper pays it for freight; or a shipper may pay the full freight partially in money and partially in cancelled legal demands against the railroad."

That is, it may pay a "different" compensation than the compensation in money, part "in money" and part "in cancelled legal demands against the railroad."

The court then said:

> "The statute's definition of a rebate is any device whereby any property in interstate or foreign commerce is transported at a less rate than that published and filed. So if the full rate be paid *either* in money or in *money's worth,* the parties cannot be guilty of rebating."

Thus the whole question here presented by counsel for the government is made to depend upon the value—"the money's worth" of the thing given in exchange for advertising space.

The court then recognized possible evasions of the law and instead of making these possible evasions controlling factors, that is, as controlling the interpretation and construction of the statute by holding that the construction would be different if it were possible to evade it than in the absence of all possibility of evasion, held:

> "Of course, the money's worth part of the payment might itself be used as a device whereby the property would be carried in interstate commerce at less than the published rate; but

> in this case the presumption must be indulged that the wheelage charge of $1 a car measured the true rental value of the S. & S. tracks."

So, here, this same presumption must be indulged, namely: that the true value of the transportation was the value named in its schedule, and that the money's worth" of the advertising or advertising space equalled that of the transportation.

This question of values is clearly settled by the evidence offered by the government, as the same appears in the quotations of such evidence from the transcript of record, following the statement of facts from the pleadings. The foregoing construction and rule for the determination of the "money's worth" and the legal effect upon shipper and carrier under the commerce act as held by the Circuit Court of Appeals in Chicago & Alton Ry. Co., *supra*, was affirmed by this court, as appears in Vol. 212, U. S. Rep., at p. 563, *per curiam*, "Judgment affirmed by divided court," etc.

These cases not only make it clear that before amendment charges need not be paid in cash, but the fact that it is yet being done in the same way by the government shows that the other departments construe the present law not to require payment in cash. It will not do to say that this way of doing amounts to a cash transaction, for by the decision in the Northwestern case the contrary is expressly affirmed. The distinction there is rested upon the fact that it was credit, not cash, and that because it was credit a difference in the amount of the charge could be made.

THE COMMERCE LAW DOES NOT TAKE AWAY THE RIGHT TO MAKE A CONTRACT, BECAUSE SUCH A CONTRACT MIGHT BE USED AS A DEVICE TO GIVE A PREFERENCE. IT ONLY TAKES AWAY THE RIGHT TO MAKE CONTRACTS WHICH ARE INTENDED TO, AND DO, GIVE A PREFERENCE.

In this connection we want to call attention to the fact that Section 10 of the original act relates alone to devices of any character resorted to for the purpose of giving an unjust discrimination. This section has not been amended. It is not broad enough to cover all contracts which *might* be used as a device. It only makes unlawful contracts *which are devices* to give an unfair advantage. To that extent it does take away the carrier's capacity to make a contract.

Interstate, etc., v. *Chesapeake, etc.*, 200 U. S. 361; 50th L. Ed. 515.

The claim now made is that the amendment prohibits certain contracts *which may be used as devices*. It seems strange that Congress would in this Section 10 go at such length into the prohibition of contracts which, in fact, were devices to give a preference, and, when it comes to legislate further on the subject, take away the power to make a certain class of contracts *which may be used as such devices*, by the insertion of the word "different" in a section in no way relating to the subject of devices, and at the same time allow this Section 10 to go unamended. It seems to us that if the subject of capacity to contract dealt with in Section 10 was to be extended to cases which might be used as devices it would have been done by amending Section 10 in no unmistaken words.

There never has been any evil to be remedied in respect to contracts of this character.

There was no question in the public mind calling for legislative action as to the manner of paying rates, fares and charges. In giving construction to the words of the statute, Congress must be presumed to have had only the evil practices of the carriers in view when the law was enacted, and as to those practices about which no public complaint was lodged, it will be equally presumed that Congress had no purpose to interfere with them. Whether, therefore, we look to the debates in Congress or to the public press for an expose of the evil growing out of the payment of tariff rates in any thing but money, it will be confessed that no claim was ever made in or out of Congress that any wrongs had been done by the payment of tariff charges through other mediums than money. There was, therefore, no occasion for legislation requiring charges to be paid only in money.

The court will look to the evils existing, and the remedies needed, to ascertain the legislative intent. As is said in *Holy Trinity, etc.,* v. *United States,* 143 U. S. 457:

> "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has often been asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislature, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of

> the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislature intended to include the particular act. * * * The construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm should not be intentionally legislated against. It is the duty of the courts, under these circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."

It is absolutely no answer to say that these contracts may be used as devices.

When they are used as mere devices the courts will assess the penalty prescribed by the act. The same insistence was made in *Dempsey* v. *New York Central,* 40 N. E. 867, but the court said:

> "We have not overlooked the argument advanced by the learned counsel for the appellant that such a construction will render it easy to evade this provision of the constitution by contracts between corporations and public officers for private services by the latter, which shall be paid for in transportation. We do not think any such danger exists, as each case must be decided upon its own facts, and the courts will see to it that the provisions of the constitution are properly enforced."

So, too, in *United States* v. *Alton Railroad, supra,* the court said:

> "Of course, the money's worth part of the payment might itself be used as a device whereby the property would be carried in interstate commerce at less than the published rate, but in this case the presumption must be indulged that the wheelage charge of one dollar per car measured the true rental value of the packers tracks."

Then, the inquiry is at once suggested, why would Congress legislate against this one class of contracts which may be, but are not, used as devices, and not legislate against others? When we say this one class of contracts, we mean those which allow payment of charges in services or property. As we have said, if prohibited at all, it must be because they may be used as devices. Why not prohibit any purchase of property or services of any one who directly or indirectly is interested in the payment of freight or passenger fares? Why not prohibit payment of any claims? These are all contracts which may be used as devices. If they are in fact so used, they are already prohibited, but when we have a case where there are many classes of contracts which may be used as devices, it is hardly consistent to say that Congress intending to correct an abuse already prohibited, would take away the power to make one of the many classes of contracts, and allow the power to make all others to continue? As a rule of construction it may be said that the intent by legislation to deny capacity to make a fair contract, must be not only within the power, but clearly within the terms of the enactment.

Speaking to this rule, Endlich, in his work on Interpretation, Sec. 340, says:

"Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly subject to a strict construction. It is presumed that the Legislature does not desire to confiscate the property, or to encroach upon the rights of persons; and it is therefore expected that if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication, and beyond reasonable doubt."

In Section 341, the same author says:

"The presumption against an intention to change the existing law, and against an intention to encroach upon the personal and property rights of individuals would seem to afford the rational basis and limitation of the rule requiring a strict construction of statutes which are in derogation of the common law, so far as the rule has any legitimate force or application. Whatever rights the individual member of a society recognizing the common law possesses, are secured to him either by virtue of express grant, or by that more nearly natural right whose principles are embodied in the common law. So far as the former is concerned, the rule applies that enactments should not be construed so as to interfere with rights previously granted by the Legislature, if susceptible of a fair construction consistent with such rights. The rights a man has by common law stand at least upon as high a plane of sanctity, and the same rule must govern the construction of statutes as regards an intention to encroach upon them."

Shaw v. *Bank*, 101 U. S. 557; 25 L. Ed. 892.

Douglass v. *Lewis*, 131 U. S. 75; 33 L. Ed. 53.

In *Interstate, etc.*, v. *Cincinnati, etc.*, 167 U. S. 479, where the court was considering the question of whether rate making power was given by the orig-

inal act the court, in applying a well settled rule of interpretation, says:

> "The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication."

The right to make a contract which has always existed heretofore on account of the common law will not be denied unless there is a statute by the terms of which the intention to take away the power to make such a contract in the future is made clear. It is unnecessary to dwell at length upon this rule of law, and it will suffice for the purposes of this case to refer to the decision of this court in the case of *Shaw* v. *Railroad Company*, 101 U. S. 557, where the court says:

> "No statute is to be construed as altering the common law further than its words import. It is not to be construed as making an innovation upon the common law which it does not fairly express."

The court can hardly assume that Congress, with some of the most renowned lawyers of the country on the committee reporting this amendment was not sufficiently advised to have said in no unmistaken terms that nothing but money should be received, if that was really its intention. Indeed, it may be fairly assumed that such members, knowing that this would be against common right, and therefore must clearly appear, did not refer to it, because they knew well that without such reference to the sub-

ject, the power as it had always existed would remain.

The law is silent respecting money payment.

> "We apply to the statute also the remark that silence is exclusion. * * * If the legislature had designed to provide for this case, according to the rule insisted upon, we cannot doubt that they would have said so in express terms. The statute bears no mark of haste or inattention. The draftsmen of the bill could not have overlooked it, and the silence of the statute is full of meaning."
>
> *Bates* v. *Brown,* 5 Wal. 717.

Keeping in mind the fact that all contracts accomplishing an unlawful purpose, were before prohibited, and by this amendment it is claimed that the power to make contracts at all, because one such as is already prohibited might be made, is not this court admonished to look beyond the question, to that of power itself?

If the proposition is once sanctioned that a power to contract at all may be denied because an unlawful contract may be made, it is hard to foretell the consequences.

It is important to observe in this connection, the statement of the court in the case of *Interstate, etc.,* v. *Chicago, etc.,* 209 U. S. 108, 118; 52 L. Ed. 705. Justice BREWER, who wrote the decision, found the reduction to be due to competition and, therefore, as he viewed the matter, commendable rather than otherwise. In the course of his opinion, Justice BREWER laid down the following general proposition:

> "It must be remembered that railroads are the private property of their owners; that while

> from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager."

Up to the time of the amendment in 1906 it is perfectly clear that Section 10 prohibited a carrier entering into any contract the effect of which was to give to any shipper an undue or unreasonable advantage over another, or which in fact accomplished a departure from the rates or terms and conditions provided for by the tariffs on file. No further legislation was necessary in order to render all such contracts unlawful.

But up to that time it is claimed and admitted that a railroad company might receive in settlement of charges for transportation either money or moneys' worth. It had the capacity up to that time to enter into a contract with a shipper to the effect that the amount of transportation charges to be earned should be paid in something other than money. It is a well settled rule of law that parties may agree to accept as payment in any case property, although there may exist the right, in the absence of the agreement, to demand payment in money. Up to that time this company could pay for its advertising by giving transportation equal to the value of such advertising. It could liquidate any of its debts by giving in value transportation. As we have seen, the prohibitions of Section 10 applies to all such transactions. If a railroad company made a contract to pay in transportation for advertising or supplies, and the contract was in fact simply a device

to give to the other party transportation service at less than the rates provided for in the tariffs, then the railway company might have been punished for making the contract.

It is claimed now that by the mere insertion of the word "different" in Section 6 at the time it was amended in 1906, this right to make contracts to receive property in payment for transportation was taken away. It seems to us that upon the rules of construction above recognized this claim is unsound. If the legislature had intended to further restrict the right to make such contracts it would have done so by amending Section 10, as that section alone related to devices which were used for the purpose of giving an unlawful advantage. It would not have done so by an amendment to Section 6, which relates alone to the manner in which rates shall be put into effect and a public record of the same made, and requires that this record, whatever it may be, shall not be departed from.

When we stop to consider the fact that the only contracts which it is claimed now that Congress was dealing with by this amendment were perfectly lawful contracts, and by that we mean contracts which in terms provided that the railroad company should receive in money value the published rates provided for by its tariffs, it seems, upon settled principles, that the claim here that this capacity to make such contracts was entirely taken away by the mere insertion of the word "different" in Section 6, is a little short of ridiculous.

THE INSERTION OF THE WORD DIFFERENT DOES NOT CHANGE THE LEGAL EFFECT OF SECTION SIX.

But it is said, why was the word "different" used if no change of intent was desired? The answer is that such changes do occur in most revisions, and the fact has been made the subject of frequent comment by the courts.

Endlich, in his excellent work on Interpretation of Statutes, Sec. 378, says:

> "The presumption of a change of intention from a change of language, of no great weight in the construction of any documents, seems entitled to less weight in the construction of statutes than in any other case; for the variation is often to be accounted for, not only by a mere desire of improving the graces of style, and of avoiding the repeated use of the same words, but from the circumstance that Acts are often compiled from different sources; and further, from the alterations and additions from various hands which they undergo in their progress through Parliament."

This principle is stated and applied in the case of *McDonald* v. *Hovey*, 110 U. S. 619; 28 L. Ed. 269. Speaking there, the court says:

> "So upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law. Sedg. Stat. Const. 365. As said by the New York Court for the Correction of Errors, in *Taylor* v. *Delancy*, 2 Cai. Cas. 150: 'Where the law antecedently to the revision was settled, either by clear expressions in the statutes, or adjudications on them, the mere change of phraseology shall not be deemed or construed

a change of the law, unless such change of phraseology evidently purports an intention in the Legislature to work a change.' And see, Yates' Case, 4 Johns. 359; *Theirat* v. *Hart*, 2 Hill 77; *Goodell* v. *Jackson*, 20 Johns. 722; *Croswell* v. *Crane*, 7 Barb. 191.

'The construction will not be changed by such alterations as are merely designed to render the provisions more precise.' *Moores* v. *Bunker*, 29 N. H. 420. So the Supreme Court has held that the Legislature of that State, in adopting the Code, must be presumed to have known the judicial construction which had been placed on the former statutes; and therefore the reenactment in the Code of provisions substantially the same as those contained in a former statute is a legislative adoption of their known judicial construction. *Duramus* v. *Harrison*, 26 Ala. 326. 'A change of phraseolgoy in a revision will not be regarded as altering the law where it has been well settled by plain language in the statutes, or by judicial construction thereof, unless it is clear that such was the intent.' Sedg. Const. 2nd Ed. 229."

The controlling purpose of this law is to guarantee to all shippers equality in rates and conditions; that when a rate is promulgated by the carrier it must be an absolute rule to all alike, and so it was made unlawful for a carrier to settle with a shipper by exacting from him a "greater compensation" than from another, and that it should be unlawful for a carrier to take a "less compensation" from one shipper than that which it exacted from another. In a word, it was that there should be no "different compensation" under the same tariff to any shipper desiring to use the "rates, fares, and charges, which are specified in the tariff filed."

THE CONSTRUCTION CONTENDED FOR WOULD LEAD TO ABSURD CONSEQUENCES.

Another test is the consequences which would follow from a decision that cash alone may be received. In that event, neither checks, drafts or other evidences of credit could be received. There is no middle ground. It is either required that it shall be cash, or else any money value may be accepted. Payment cannot be made in anything but money unless the parties otherwise agree. If their right to agree to payment in anything but money is taken away by the amendment of Section 6, then it is just as unlawful to accept a check as to accept advertising.

The legal character of a check and an account is the same. They are each choses in action, evidence of a debt, but in different form. There can be no distinction between debts, for if payment can be made in one it may in the other.

The legal character of a check is well defined.

In the case of *Wells* v. *Morrison,* 91 Ind. 51, the court held that while it was a rule of law that payment of a less sum would not discharge a greater debt, yet where payment was by check it was different. Speaking at page 62, the court says:

> "Such a check must be viewed as an inland bill of exchange. *Glenn* v. *Noble,* 1 Blackf. 104. In its quality of negotiability under the law merchant, it exactly resembles a bill of exchange. Byles Bills, 13; Chitty, Bills, 10th Am. Ed. p. 511. It is one of the exceptions to the general rule laid down by the court in its construction No. 5, that where the less sum is paid by a check, or other instrument negotiable by

the law merchant, it may operate as a discharge of the entire indebtedness."

It is held that checks in many respects resemble bills of exchange "and are, in many respects, governed by the same rules and principles as the latter."

Harrison v. *Wright,* 100 Ind. 515, 519.

"A bill of exchange is not money in any sense."

United States, etc., v. *Clark,* 83 N. E. 760, 762 (Ind. App.).

The absurd consequences which must come from a judicial sanction of this claim is seen when we stop to think of the result of an obedience in the fall of 1907. Almost in a day all business went to a checking basis. If at that time railways had applied the law as it is claimed they should, the vast commerce of the country must have stopped. Traffic could not move without the cash, and that could not be had. If this injunction is allowed, it means that when the United States Government desires to move troops or property, the cash must be put down for the charges. Not warrants. Not vouchers. Not requests, but the cash. The test is not that something which will surely get the cash is given. It is either cash from all, or money value from all.

We even now have this anomolous condition. The general government through one of its agencies is trying to enjoin our accepting anything but cash. The other departments are daily having us do business on a credit basis. It is a case of the government getting an injunction against itself. And, we

dare say, it will be the one most anxious to be rid of it when it is allowed.

These remarks might be called somewhat extravagant. But they deal with existing conditions, and what better illustrations of the absurdity of the government's claims here can be found?

THE SAME RESULT MAY BE ACCOMPLISHED INDIRECTLY.

It is admitted that we may buy advertising for cash. We are required to sell transportation to all when the published rates are tendered. These two transactions are perfectly legal and admitted to be so. Yet by some process of reasoning when these two perfectly legal transactions are interwoven; when the agreement to sell and buy are put on the same paper, the whole agreement is in violation of law.

The Munsey Magazine Company could hand over to the carrier $500 in money for tickets or mileage books, and in turn this could be handed back for advertising, and if this were done, what advantage would accrue to the traveling public that is not just as securely obtained under the contract in question? Whether done in one way or the other, nobody is injured by it. On the contrary, the transaction is one of benefit to the carrier, the publisher and the public. The carrier under its contract, adds to its income by securing for its line travel that it might not otherwise obtain; the publisher secures advertising which it might not secure at all; the public is given the fullest information about the carrier's attractions and rates.

If, therefore, this contract right is denied, the traveler paying his fare at the ticket office would

gain absolutely nothing, while the publisher and the carrier would both suffer more or less loss in their business.

The learned judge refers to the fact that the contract recites that a transfer of the transportation is a misdemeanor. If, as said by counsel, this is not in the published tariff, and to be effective must be there, then it is simply ineffective. However, it is a mere recital of an Indiana statute which would apply in all cases where the transportation was used within the state.

Burns' R. S. 1901, Sec. 3300.

The court was of the view that it should not matter who uses the ticket, if it is bought with the equivalent of money. It is sufficient to say that the practice to issue non-transferable tickets is so common that the courts know of it judicially. And but recently this court has held that in such cases injunction will lie to prevent the resale of such tickets. Counsel might as well say what difference could it make in such cases, for there the tickets were sold for cash, and yet the non-transferable feature was not only desired, but the right to it sustained.

Conclusion.

It is impossible to escape the discovery that the government here has no fault to find with this contract upon the agreed facts. It is the ever present fear that some one will be paid more than the fair value of the service rendered, either by the terms in the form in which it is first made, or because of a change in conditions subsequent thereto. What place can the claims of counsel to the effect that at some time in the future the service may be worth less than the value of the transportation, have other than to show that some day there may be an unlawful preference? And what place can that have in this case inasmuch as it is admitted that up to this time there has been no unlawful preference by the arrangement made? It all comes back to the intent of Congress and the evil to be guarded against. It is not because some one may at some time make an unlawful contract. It is not because an existing contract may at some time in the future become unlawful, but because an unlawful preference is actually accomplished by a transaction provided for by it. Until the contract actually accomplishes this or until conditions arise from which it can be seen that if carried out an unlawful preference will be allowed, there is no occasion for the intervention of equity.

Respectfully submitted.

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